

Tilting the Balance of Power

Adjudicating the RTI Act



RaAG

Research, Assessment and Analysis Group



Tilting the Balance of Power

Adjudicating the RTI Act for the
Oppressed and the Marginalised

A detailed analysis of the orders of the Supreme Court of India, and of various high courts and information commissions, pertaining to the Right to Information Act in India, in terms of their implication on the quality of governance

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Research, Assessment, & Analysis Group (RaaG) was incorporated in 2016 as a private limited company with the objective of studying various issues of public interest. It evolved out of an informal research group set up in 2008 and variously known as the Right to information Assessment & Analysis Group, and the Right to information Assessment & Advocacy Group. This informal group published its first report in 2009: *Safeguarding the Right to Information: Report of the People's RTI Assessment* (<http://x.co/ncprices>), followed in 2014 by *Peoples' Monitoring of the RTI Regime in India: 2011-13* (<http://x.co/raagces>), and in 2015 by "Who Uses the RTI Act in India, and for What?" in *Empowerment Through Information: The Evolution of Transparency Regimes in South Asia*, published by the Transparency Advisory Group and the Research Initiatives, Bangladesh: [http://transparencyadvisorygroup.org/uploads/Empowerment through Information - Volume II.pdf](http://transparencyadvisorygroup.org/uploads/Empowerment%20through%20Information%20-%20Volume%20II.pdf). Currently, RaaG has three sub-groups, one working on governance issues (which was involved in this study), the second on environment and social issues, the third on education and culture.

Satark Nagrik Sangathan (SNS) is a citizens' group working to promote transparency and accountability in government functioning and to encourage active participation of citizens in governance. It is registered under the Societies Registration Act, 1860 as Society for Citizens' Vigilance Initiative.

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This report is dedicated to the memory of some of the doyens of the RTI movement who have since passed on:

Ajit Bhattacharjea

1924-2011

Prabhash Joshi

1936-2009

Prakash Kardalay

1941 -2007

S.R. Sankaran

1934-2010

We can easily forgive a child who is afraid of the dark; the real tragedy of life is when adults are afraid of the light

Adapted from Plato

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PREAMBLE

Preface and Acknowledgements

The writing of this report has proved to be both challenging and rewarding. At the very start, the prospect of understanding, assessing and critiquing orders¹ of the high courts and the Supreme Court overwhelmed us, especially as none of us were trained lawyers. However, our belief that the rationale of decisions made by public institutions must be accessible and comprehensible to an average citizen, gave us the confidence to persist. The recognition of our own averageness gave us the credentials to investigate.

The first immediate task was to construct the sample and have the sample orders surveyed for content and rationale. In total, a sample of nearly two thousand information commission orders, and nearly three hundred high court orders, were surveyed by a team of researchers. We ourselves studied over thirty Supreme Court orders, including all those that adjudicated on the RTI Act, and then verified and analysed the findings of the survey done by the research team. This proved to be a larger task than we had anticipated.

Apart from the sheer volume, we found some other factors inhibiting our efforts at verifying and analysing these orders. The judicial profession has, over the years, developed an exclusive language with a vocabulary that is not widely known. Of course, so have other professions, so you no longer have a heart attack but a *myocardial infarction*, and this is not the result of a narrowing of arteries, but of *stenosis*. The labels seem more challenging than the disease! There were many similar examples in judicial orders. Our favourite one was “lis”, which for many weeks we thought was a mistyped “list”. However, when we came across this typo once too often, we consulted a legal dictionary (our Word software continues to show it as a typo) and discovered that it meant “*A law suit; an action; a controversy in court; a dispute...*”² Perhaps the time has come for public institutions and professionals to speak in a language that can be easily understood by the public.

As we started beginning to understand what various judicial orders meant, we also started realising that there was a lot of inconsistency across judicial orders, especially of the high courts. Different high courts, and sometimes even the same high court, held positions that seemed to the hapless average citizen to be contrary, if not contradictory. As the RTI Act is a national law and people residing in one state can, and do, apply for information from another state, this meant that they had to be familiar with the adjudications of each high court so as to understand what was required, and what was possible. The fact that IC orders also suffer from the same malaise, and additionally each state and each competent authority can have their own rules, threatens to make the filing of an RTI application a task that only rocket scientists can perform. It might be worth discussing, publicly and among the concerned institutions, how this problem can be tackled.

The second major challenge we faced in trying to understand these various orders was the fact that many of these orders, especially those of information commissions, were cryptic and neither contained basic information about what was being adjudicated upon, nor the rationale for the decision. Often, even the provision of the law that was applicable was not mentioned.

For orders of the information commissions, there was the further challenge that many state ICs gave orders only in the state language, and no translations were available either in English (which is the language of the higher courts), or in Hindi.

¹ In this report we have mostly used the terms “order” and “judgement” interchangeably.

² Interestingly, before we finally discovered the legal meaning, we also came across another disconcerting meaning of “Lis”: “laughing in Silence”.

As we started forming an understanding of the body of judicial and commission orders, we found evidence in support of some common apprehensions about the RTI adjudicatory process. For example, across the board we found a hesitation in imposing legally mandatory penalties for clear and established violations of the RTI Act. This was rampant among the information commissioners, but not totally absent among the higher judiciary. We also found huge delays among information commissions, often without good reasons.

Proactive disclosure, we found, continued to be a weak area and the commissions continued to look the other way. Equally disturbing was the focus on proactive disclosure purely through the web, even when nearly three fourths of the Indian population, the one that most desperately needs access to information, has no internet connection. Of significance was our realisation that despite the RTI Act mandating that public authorities must proactively publish all relevant facts while formulating important policies or announcing the decisions which affect public, and proactively provide reasons for all administrative or quasi-judicial decisions, public authorities were not following this dictum. In fact, even when specifically asked for, information regarding why certain decisions were taken was hard to come by, made worse by an incomprehensible tendency, among many PIOs and information commissioners, to maintain that under the RTI Act you cannot ask for reasons or for an answer to the question “why?”.

We also confirmed that there was a fast-growing tendency among PIOs to illegally “transfer” RTI applications to other PIOs in the same public authority, thereby not only converting a single application into a dozen or more, but also starting an endless run-around. Though there are progressive judicial orders holding such a practice to be illegal, most information commissions do not seem to have taken note of this. Similarly, we discovered an increasing tendency among commissions, especially the Central Information Commission, to revert complaints and appeals to first appellate authorities and even to PIOs, totally in disregard to the letter and spirit of the RTI Act.

Perhaps the most disturbing of the various regressive tendencies observed among the adjudicators was the propensity to ignore legally mandated, and universally applicable, public-interest overrides on exemptions to the disclosure of information. Most orders (commissions and the judiciary) did not even mention this, leave alone apply it and, in some cases, it appeared as if the adjudicators were unaware of the relevant provisions of the law.

Similarly, the legally mandated and universally applicable provision that information that cannot be denied to Parliament or to a legislative assembly, cannot be denied to an RTI applicant was mostly ignored and rarely mentioned.

The data gathered for this study confirmed that adjudicators were by and large not insisting on the legally mandated provision of redacting exempt information from documents and records, and disclosing the remaining bits. In fact, in some orders, the presence of exempt information in a portion of the record was explicitly cited as the basis for withholding the disclosure of the entire record.

There was also evidence that most adjudicators were ignoring the legal requirement for PAs to provide information free of charge, where a delay had occurred. Others were prescribing arbitrary limits to the number of pages that need be given free, in direct violation of the law.

A widely prevalent lapse was the unwillingness to put, as required by law, the onus of proof and justification on the PIO, both in appeals and in complaints. This often led to adjudicatory proceedings and hearings relating to the RTI Act following the traditional path of the applicant being called upon to prove that the information being asked for was not exempt from disclosure, or that the RTI Act was violated, and without any acceptable grounds, by the PIO.

While analysing the data, and writing the report, we also came across a large number of critical issues and debates that need an urgent and definitive resolution. These include the definition of “substantially

financed” and of “fiduciary”, the first not yet definitively defined, and the second having multiple and often mutually contradictory definitions in even Supreme Court orders. There is also a need to define “confidential” in the context of the RTI Act, considering that the RTI Act mandates its own sets of “exclusions” to the disclosure of information, and overrides all other laws and instruments.

Another concept needing an urgent definition is “disproportionate diversion of resources”. This has become an easy-to-invoke and a rarely-questioned exemption to deny information, even though such a denial is not envisioned under the law. Perhaps it’s time that a norm was developed to determine what was a disproportionate diversion.

There were certain stands taken by the adjudicators which, though in consonance with their powers as adjudicators and as interpreters of the law, need a wider public debate. These include the interpretation of privacy (and fiduciary) to exempt most or all information about people’s assets (public servants and others) and about the evaluation of professional performance of public servants. A similar debate needs to be initiated about the exemption emanating out of a risk to life and physical well-being, where “life” has been defined in a very wide sense to cover even reputation, and the identity of critical functionaries is sought to be forever withheld from the public, as it might threaten their well-being and sully their reputation.

In looking at the judgements and analysing them for this report, we also made some exciting discoveries. Perhaps the most significant was that the Supreme Court has definitively and repeatedly held that it is well settled that once a statute gives a power to an authority to do something, then it includes the implied power to use all reasonable means to achieve that objective. This implies that the sense of powerlessness that the information commissioners often feel is misconceived. Given the fact that the RTI Act mandates them to require public authorities to take any steps that may be necessary to secure compliance with the provisions of the Act, the various Supreme Court orders assure them of the “implied power” to reasonably make all this happen.

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Amrita Johri
Anjali Bhardwaj
Shekhar Singh

New Delhi, December 2016

Glossary

Of terms and abbreviations

ACP	Assistant Commissioner of Police	dt.	Dated
ACR	Annual Confidential Report	DUSIB	Delhi Urban Shelter Improvement Board
Aadhar	<i>Aadhar</i> is a 12-digit unique number which the Unique Identification Authority of India (UIDAI) issues to all residents of India	DVC	Damodar Valley Corporation
AICTE	Advances in Information Communication Technology & Computing	Edn.	Edition
ALL	Allahabad	EHRR	European Human Rights Report
APAR	Annual performance appraisal report	FAA	First Appellate Authority
AP	Andhra Pradesh	FGD	Focus group discussion
APIO	Assistant Public Information Officer	FOIAs	Freedom of Information Acts
ARU	Arunachal Pradesh	G.O.	Government Orders
ASS	Assam	GATE	Graduate Aptitude Test in Engineering
BDO	Block Development Officer	GNCTD	Government of National Capital Territory of Delhi
BIH	Bihar	Gramin	Rural
BOM	Bombay	GRIDCO	Grid Corporation of Odisha
BPL	Below Poverty Line	GUJ	Gujarat
BPSC	Bihar Public Service Commission	Guntas	Gunta also Guntha is a measure of area
BPL	Below Poverty Line	HAR	Haryana
BSNL	Bharat Sanchar Nigam Limited	HC	High Court
CAL	Calcutta	Higher courts	The Supreme Court and the high courts
CBSE	Central Board of Secondary Education	HP	Himachal Pradesh
CDPO	Child Development Project Officer	HPC	High powered committee
CES	Centre For Equity Studies	HPCL	Hindustan Petro- Chemicals Limited
CGHS	Central Government Health Scheme	HPSC	Himachal Public Service Commission
CHH	Chhattisgarh	HSSC	Haryana Staff Selection Commission
CIC	Central Information Commission	HSTSB	Haryana School Teachers Selection Board
CJI	Chief Justice of India	HQ	Head-quarters
CMD	Chairman and managing director	IC	Information commission
CMO	Chief Minister's Office	ICAI	The Institute of Chartered Accountants of India
CPC	Civil Procedure Code	ICO	Information Commissioner's Office
CPIO	Central Public Information Officer	IDFC	Infrastructure Development Finance Corporation
Crore	Ten million	IPC	Indian Penal Code
CVC	Central Vigilance Commission	IT	Information Technology
CWP	Civil Writ Petition	JHA	Jharkhand
DEL	Delhi	JEE	Joint Entrance Examination
DoPT	Department of Personnel & Training, Government of India	Judgement	The comprehensive and final pronouncement on a case by the SC and the HCs.
DPC	Departmental promotion committee	JWM	Junior Works Manager
DRDA	District Rural Development Agency	KAR	Karnataka
DRDO	Defence Research and Development Organization		

KER	
KPSC	Karnataka Public Service Commission
Lakh	A hundred thousand
LIC	Life Insurance Corporation
LPG	Liquid Petroleum Gas
MAD	Madras
MAH	Maharashtra
MAN	Manipur
MCD	Municipal Corporation of Delhi
MEG	Meghalaya
MIS	Management information system
MIZ	Mizoram
MP	Madhya Pradesh
NAG	Nagaland
NCPRI	National Campaign for Peoples' Right to Information
NGOs	Non Government organisations
NTPC	National Thermal Power Corporation Limited
ODI/ORI	Odisha
OERG	Odisha State Electricity Regulatory Commission
OM	Office Memorandum
OMR	Optical master recognition, also called optical mark reading
Order	Specific directions of courts; Directions of information commissioners
ORM	Object-relational mapping
ORS	Online registration system
Ors.	Others
OSA	Official Secrets Act
PA	Public Authority
P&H	Punjab & Haryana
PAT	Patna

PIL	Public interest litigation
PIO	Public Information Officer
PMO	Prime Minister's Officer
PSC	Public Service Commission
PUN	Punjab
RaaG	Research, assessment, & analysis Group
RAJ	Rajasthan
Rs./ ₹	Rupees
RBI	Reserve Bank of India
RPSC	Rajasthan Public Service Commission
RTI	Right to Information
SC	Supreme Court
SEBI	Securities and Exchange Board of India
SIC	State Information Commission
SIK/SIKK	Sikkim
SLP	Special Leave Petition
SNS	Satark Nagrik Sangathan
SPIO	State Public Information Officer
THDC	Tehri Hydro Development Corporation
TN	Tamil Nadu
TRI	Tripura
UOI	Union of India
UK	United Kingdom
UoI	Union of India
UP	Uttar Pradesh
UPSC	Union Public Service commission
USA	United States of America
UTI	Unit Trust of India
UTT	Uttarakhand
WB	West Bengal
W.P	Writ Petition

Introduction

The Right to Information (RTI) Act has undoubtedly been one of the most empowering legislations for the people of this country. It has been used extensively for a range of issues: from holding local governments and functionaries accountable for lapses in the delivery of essential services and the safeguarding of basic rights and entitlements, to questioning the highest authorities of the country on their performance, their decisions, and even their conduct. The RTI Act has thereby started the process of redistributing power from the elite few to the general public, and initiated the task of converting India into a true democracy.

Being one of the few legal instruments in India that empower the people to regulate the government, in contrast to most others that empower the government to regulate the people, the RTI Act has been continuously attacked and persistent efforts made to weaken it or to make its implementation increasingly ineffective. Earlier studies done by RaaG and others³ have studied in detail the various challenges faced in the proper implementation of this Act. This study focuses on some of the most critical institutions charged with the responsibility of ensuring that the RTI Act continues to promote transparency and accountability of governments at all levels, and thereby strengthen democracy. These are the independent adjudicators, essentially the information commissions, the high courts, and the Supreme Court of India.

Though the functioning of information commissions has been examined in some of the earlier studies referred to above, these mainly focussed on the statistical and administrative parameters, in terms of how many complaints and appeals were received by each commission, how long did it take to dispose them off, in what proportion of the cases did the commission allow the disclosure of all or part of the information sought, and how many penalties did it impose. There was also an effort to assess the profile of information commissioners and to assess the adequacy of the budgets and the staff of commissions.

Admittedly, some of this has also been done in this study, but the main focus here is to analyse the quality of the orders of the commissions and of the courts, and to understand the implication that these orders have on the transparency regime in India.

Background and genesis

This study is partly a continuation of the ongoing efforts to record and analyse the implementation of the RTI Act in India. But its timing, structure and methodology has been significantly influenced by emerging concerns about the failure of transparency regimes to effect sustained and progressive systemic changes in the process of governance, rather than just addressing complaints and grievances, relating to specific issues, that continue to recur despite increased transparency.

While investigating reasons why a flourishing RTI regime in India, with more RTI applications being filed than in any other country in the world, was not resulting in greater and more rapid systemic changes in governance, the initial focus was on public authorities and the assumption was that they were not doing what was required to learn lessons from the huge number of RTI applications that were being filed, or converting whatever lessons were being learnt into systemic changes and improvement. Though this assumption still holds good, and is being separately investigated, in the process of investigating this it became increasingly obvious that the adjudicatory bodies also had a much greater impact, than earlier recognised, in inhibiting progressive systemic changes. Hence this study.

³ See, for example, *Safeguarding the Right to Information: Report of the People's RTI Assessment 2008 - Revised Executive Summary & Draft Agenda for Action*. 2009. Available at <http://x.co/ncprices>; *Peoples' Monitoring of the RTI Regime in India: 2011-13*. RaaG 2014. Available at <http://x.co/raagces>; "Who Uses the RTI Act in India, and for What?". Right to information assessment and advocacy Group (RaaG) & Transparency Advisory Group (TAG), in Bari, Chand & Singh (Ed.) *Empowerment Through Information: The Evolution of Transparency Regimes in South Asia*. Volume II: Empirical Studies. Available at <http://x.co/tagribII>

Purpose and objectives

The overall purpose of this report, and of much of the research done for it, is to improve the quality of governance in India, especially in terms of its impact on the oppressed and marginalised sections of society. Specifically, this report looks at how to make the RTI Act more effective for improving governance, especially by bringing about systemic changes, through better adjudication.

Towards that end, this report analyses orders and directions of the Supreme Court, along with recent orders of the various high courts, pertaining to the RTI Act. In addition, a sample of orders of information commissions are also analysed. Details of the sample and the sampling methodology are described in the *Statement of Methodology* below.

The objectives of this report, or what it hopes to achieve, are many. Foremost is the hope that the analysis and critique presented here provokes a public debate on the manner in which the RTI Act is being understood and interpreted by the adjudicators. Underlying this hope is the belief that in India there is inadequate informed public feedback to adjudicators, on interpreting and applying legal provisions critical to the upholding of fundamental public interest. Consequently, adjudicators, especially the higher judiciary, are denied access to an informed public debate. This is especially critical as the higher judiciary in India not only adjudicate on matters of law, on which they undoubtedly have great expertise, but on many other matters on which they could well benefit from the views of the public and of experts among the public.

This lack of informed public debate also results in a sense of powerlessness and frustration amongst the public, as adjudicators give orders regarding matters that intimately concern them, without the basis and rationale behind the order being subjected to a public debate. Such a debate, apart from clarifying the various possible viewpoints, also helps the public to understand the various issues involved, and to understand the rationale of an order, even where they are not in agreement with it. Therefore, the first objective of this report is to facilitate such a public dialogue on issues related to the RTI Act, which mostly are of great interest and concern to the general public, and which are being adjudicated by information commissions, and in some cases by high courts and even the Supreme Court.

Undoubtedly, the judiciary and other adjudicating agencies must be objective and unbiased, and not be swayed by prevailing public opinion, however overwhelming. But surely the cause of justice would be furthered if the judiciary was privy to all sides of well-reasoned arguments that members of civil society sought to present, and to the pertinent facts they highlighted.

If analysis of adjudicatory orders presented in this report are kept in mind and considered by judges of the Supreme Court and high courts while adjudicating on RTI related issues, then another major objective of this report would be fulfilled. Obviously it is not expected that all judges will agree with every point made in this report. However, if the issues raised here and raised in the larger public debate, that will hopefully be provoked by this report, are kept in mind, it would be one way of ensuring that the people of India, who in many of these matters are collectively an interested party, get their right to be heard, thereby satisfying an important principle of natural justice.

Another primary objective of this report is to reach out to information commissioners to alert them on the common errors that have crept into many of their orders, and raise issues that need further detailed consideration. The findings of this report suggest that trends set by earlier commissioners often get emulated by new commissioners in the same commission. For example, the original commissioners in many of the information commissions, from the time they were set up, were hesitant to impose penalties⁴ and this tendency has been emulated by most, if not all, of their successors.

⁴ See, for example, Page 19-20 of *Safeguarding the Right to Information: Report of the People's RTI Assessment 2008 - Revised Executive Summary & Draft Agenda for Action*. 2009. Available at <http://x.co/ncprices> ; Chapter 9, Section 9.3.6 of *Peoples' Monitoring of the RTI Regime in India: 2011-13*. RaaG 2014. Available at <http://x.co/raagces>

As a contrast, some of the earlier commissioners in the Assam Information Commission started the practice of issuing a show cause notice to almost all the defaulting PIOs, seeking their justification on why penalty should not be imposed on them. This habit continues till now, though sadly it is usually not followed by the actual imposition of penalties⁵.

In the Central Information Commission, a trend was started of remanding complaints to first appellate authorities, and this seems to have caught on, so much so, that in the sample analysed for this study almost 80% of the complaints received⁶ were so remanded.

There is much evidence in the report to suggest a pressing need for greater discussion within, among, and with information commissions on the finer points of law and jurisprudence. Therefore, it is hoped to start a dialogue among information commissioners and between commissioners and other legal and RTI experts, to discuss many of the seeming weaknesses that this report has highlighted in the functioning of commissions. It is also hoped, thereby, to institutionalise a process by which there is ongoing informed feedback from the public to each of the commissions.

This report gives strong indications that the adjudicatory system around the RTI Act needs urgent correctives. It also argues that the required correctives would be difficult unless the civil society gets involved. This involvement could be in the form of interactions with governments and commissions, media campaigns, and even cases filed in the Supreme Court to get definitive directions on critical provisions of the law or legal processes, which are being disregarded, misinterpreted, or misused.

Finally, this report hopes to be of use and assistance to the RTI applicant, and to those public-spirited lawyers and activists who try and help and support applicants in their quest for information. In so far as this report makes available details and citations of past judicial orders that support access to information, and gives a plethora of arguments in support of disclosure, applicants might find it useful when they are drafting their applications and especially when they are formulating and arguing their appeals.

Structure and organisation

Apart from a preamble containing, among other things, an introduction and a statement of methodology, this report is divided into thirty chapters organised into six parts. The first part deals with some overarching issues, including the jurisdiction of the higher judiciary and the functioning of the information commissions. Part two to six deal with various sections of the RTI Act, broadly in the same order in which they appear in the RTI law. Each chapter contains, at the end, an agenda for action, which lists some of the immediate action that could hopefully emanate from the findings of the report.

The annexures contain various tables and supporting information, as also extracts from some of the court orders that were thought to be important enough to make readily available, but too lengthy to include in the main narrative of the report.

Scope

As mentioned earlier, this report is essentially an analysis of orders of the Supreme Court and of various high courts and information commissions, relating to the RTI Act. As things stand, section 23 of the RTI Act specifies that no court shall entertain any suit etc. in respect of any order made under this Act. However, despite this, the jurisdiction of the Supreme Court to adjudicate on matters related to the RTI Act is drawn from Article 32 and 136(1) of the Constitution.

⁵ See chapter 5, section h

⁶ See chapter 5 section j

Similarly, the various high courts draw their jurisdiction from various articles of the Constitution, which empowers them to issue orders, directions, or writs to any person, authority or government within their jurisdiction.

Also, the Supreme Court and the high courts can be approached in the form of a public interest litigation. For a detailed discussion on the jurisdiction of the higher judiciary, see chapter 4(a).

The various information commissions, on the other hand, draw their adjudicatory powers and obligations directly from the RTI Act. For adjudicating on complaints, section 18(1) of the RTI Act states that “*Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person...*”. It then goes on to list the various possible violations that could justify a complaint, ending the list by a catch-all “*in respect of any other matter relating to requesting or obtaining access to records under this Act.*”

The commissions also draw their adjudicatory powers for hearing appeals from section 19(3) of the RTI Act, which authorises them to hear appeals against the orders of the first appellate authority, or to directly hear the matter if the first appellate authority has not responded in the prescribed time limit of 45 days.

Though section 19(1) of the RTI Act empowers first appellate authorities (FAAs), within the same public authority, to adjudicate on appeals from applicants on various matters relating to illegalities committed by the PIO, and therefore FAAs are also adjudicatory authorities, their orders are not being discussed in this report as they are not independent and by and large have proven to be ineffective⁷.

Issues

This report analyses all the Supreme Court orders centrally focussing on provisions of the RTI Act, and available till February, 2016. It highlights those portions of the orders that are binding on high courts, information commissions, and also on public information officers. Where these orders are supportive of the spirit and letter of the RTI Act, they are highlighted with the objective of making the readers aware of their nuances and stressing to everyone their binding effect. However, where the orders are thought to be either requiring further consideration, or thought to be in violation of the letter and spirit of the RTI Act, they are critiqued and detailed reasoning provided for the critique.

A similar analysis has been done for the high court orders in the sample. However, given the numbers, only the best of the good orders are highlighted and the others just mentioned. For orders that are considered to be requiring further debate, or are seemingly in violation of the RTI Act, only those are highlighted that have significant adverse implications.

Overall, the treatment of high court orders in this report is not comprehensive, nor is it intended to be. The objective is to highlight the best of the supportive orders and to critique the most critical of the adverse orders. This is in keeping with the primary purpose of this report, which is to strengthen governance in India through making the RTI regime more effective.

Information commissions are treated differently to the Supreme Court and the high courts. The commissions are quasi-judicial or administrative bodies, and have been set up under the RTI Act to exclusively adjudicate appeals and complaints emanating from RTI applicants. They also have some other functions and obligations under the RTI Act, but this report focusses mainly on their adjudicatory role.

The information commissions have been given the legal mandate to treat all asked-for information as *prima facie* disclosable, with the onus on the denier of the information to establish that it is exempt from disclosure under the RTI Act. The commissions are also legally obliged to penalise PIOs and others for all

⁷ For a detailed discussion on the role of first appellate authorities, please see chapter 6, section 6.3.2 of *Peoples' Monitoring of the RTI Regime in India: 2011-13*. RaaG 2014. Available at <http://x.co/raagces>

violations of the RTI Act, except under a few specific conditions. The RTI Act also puts the onus on the PIOs to establish the absence of their liability for any violation of the RTI Act that might have taken place.

This legal mandate raises the levels of expectation from information commissions who must always be, and seen to be, on the side of the complainant or appellant, and in support of disclosure of information, unless such disclosure is legally exempt. Therefore, by and large, this report takes for granted the orders which allow the disclosure of information, of which there are many (around 74% of the total appeals that were adjudicated upon in the sample). It focusses on the adverse orders, especially those that deny information and other reliefs to the appellant or complainant, seemingly in violation of the RTI Act. It also focusses on orders of the ICs that have other deficiencies, especially if these are common deficiencies being oft repeated by some or all of the commissioners in some or all of the commissions.

As, by and large, IC orders do not have a precedential value and nor are they binding on others except those specifically cited, there is less value in highlighting the supportive orders. Besides, ordinarily one would expect commissions to come up with only supportive orders. However, a detailed analysis of a random sample of nearly 2000 orders of the Central Information Commission and the Information Commissions of Assam, Bihar and Rajasthan⁸, suggests that a large number of the orders of the information commissions seem to suffer from deficiencies of one type or another, or are based on assumptions and interpretations that are clearly mistaken, not self-evidently correct, or, at the very least, could legitimately accommodate alternative viewpoints

Each of the orders of the courts and commissions have been examined from at least three perspectives, as described below.

i) Orders inappropriately interpreting the law: Interpreting a law is legitimate where there is ambiguity in the language, where there have been conflicting interpretations, or where it needs to be in consonance with the larger body of law and jurisprudence. Also, sometimes interpretation is required where the law is seemingly ultra vires of the Constitution. However, in some of the orders analysed, the courts and commissions seem to have gone beyond the norms laid down by the Supreme Court itself. In **SC *Thallapalam 2013*** the Supreme Court had, quoting various SC orders, cautioned adjudicators thus:

“...the courts are warned that they are not entitled to usurp the legislative function under the guise of interpretation.

*“...the court must avoid the danger of an a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provisions to be interpreted is somehow fitted. It is trite law that words of a statute are clear, plain and unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences, meaning thereby when the language is clear and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the statute speaks for itself. This Court in **Kanai Lal Sur v. Paramnidhi Sadhukhan** AIR 1957 SC 907 held that “if the words used are capable of one construction only then it would not be open to courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.”*

“....Court cannot, when language is clear and unambiguous, adopt such a construction which, according to the Court, would only advance the objective of the Act.”

ii) Illegal orders: There are at least five types of orders that have been classified as being illegal:

Type 1: First, there are orders that are in violation of the Constitution, or of relevant laws, without giving any justification or citing a binding legal precedence. These can legitimately be called illegal orders.

Type 2: There are orders that are in violation of specific binding legal precedents, like applicable orders of the Supreme Court (for high courts and commissions) or various high courts (for commissions).

⁸ For methodology and details of sample please see Statement of Methodology below

⁹ For detailed discussion see Chapter 1(c)

Considering the constitutional status of the Supreme Court and the high courts (vide Articles 136 and 226, among others), orders by subordinate judicial and quasi-judicial bodies that are in violation of applicable judicial precedents can also be termed to be illegal orders.

Type 3: There are orders that are in violation of applicable general directions given by the Supreme Court and High Courts. These are usually regarding procedures, limitations, roles and functions of judicial, quasi-judicial and administrative bodies, and their violation can also result in illegal orders or, at the very least, technically deficient orders.

Type 4: Some orders issue directions that are beyond the powers given to courts or the ICs, under the RTI Act or other relevant laws and provisions of the Constitution, and are thereby illegal.

Type 5: Finally, there are orders that are incomprehensible or internally contradictory, making it impossible to either assess the basis of the order, or sometimes even what has been ordered. If the Delhi High Court dictum is to be accepted, then these would also be illegal orders. The HC stated in ***HC-DEL THDC 2013*** that “*The failure to supply reasons infuses illegality in the order, and thus deprives it of legal efficacy.*”

iii) Orders requiring further debate- There are many sections and clauses in the RTI Act that allow the public information officer or the public authority to use their discretion and judgement, unless binding interpretations have been enunciated by higher judicial authorities or by other relevant statutes. The specific questions which require the exercise of judgement by the PIO and/ or the PA, and adjudication by the FAA, the ICs, and in some cases by the courts, include:

1. What is “substantive funding”? - S. 2(h)(d)(i)&(ii)
2. What are “relevant facts”? – S. 4(1)(c)
3. Who are “affected persons”? – S. 4(1)(d)
4. What does “reasonable assistance” involve? - S. 6(1)(b)
5. What is “reasonable” fee? - S. 7(5)
6. Under what conditions does the providing of information in the form asked for result in a “disproportionate” diversion of the resources of a public authority? - S. 7(9)
7. The disclosure of what information, and when, would “prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence”? – S. 8(1)(a)
8. What information “would harm the competitive position of a third party”, and when? – S. 8(1)(d)
9. When, and for what information, does “larger public interest” warrant the disclosure of even information that would otherwise be exempt? – S. 8(d)(e) & (j)
10. Disclosure of what information, and when, “would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes”? – S. 8(1)(g)
11. What information, if disclosed, and when disclosed, “would impede the process of investigation or apprehension or prosecution of offenders”? – S. 8(1)(h)
12. What information “has no relationship to any public activity or interest” or, if disclosed, “would cause unwarranted invasion of the privacy of the individual”? – S. 8(1)(j)
13. Under what condition does “public interest in disclosure outweigh the harm to the protected interests”? - S. 8(2) & 11(1)
14. When to deny access to material that is copyrighted, to a non-state entity? - S. 9
15. When are there (for ICs) “reasonable grounds to enquire” into a matter and initiate an enquiry? - S. 18(2)
16. What are “sufficient” causes for delay in appeals (FAA, ICs)? - S. 19 (1) & (3)

17. What is a “reasonable opportunity of being heard”? – S. 19(4), 20(1)
18. When and in what manner to “require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act” (ICs)? - S. 19(8)(a)
19. How to determine loss, detriment, and the appropriate compensation (ICs)? S. 19(8)(b)
20. How much penalty to impose, except in cases of delay, where the quantum is prescribed (ICs)? – S. 19(8)(c), 20(1)
21. Whether the violation of various provisions of the law was malafide, without reasonable cause, knowingly done, and/or persistent, as applicable (ICs)? S. 20(1), 20(2)
22. Under what conditions do allegations qualify to be about corruption and human rights violations? S. 24(1) & 24(4)

Orders that seek to answer any one or more of the questions listed above, can sometimes be considered deficient, where no reasoning or insufficient reasoning is given for their answer. Where detailed reasoning has been provided, but there are alternate legitimate viewpoints, then such orders have been classified as being debatable and are discussed separately. Of course, any order can be both debatable and deficient, if parts of the order are illegal or incomprehensible, and other parts debatable.

Agenda for Action

There are at least five types of actions that could hopefully follow from the findings, analysis, and recommendations contained in this report.

- i. A consideration by judges of the Supreme Court and the various high courts of the issues, points and arguments raised pertaining to judicial orders and the interpretation of the law. Hopefully these would be of use when they next hear a matter concerning the RTI Act.
- ii. A similar consideration by information commissioners, with the hope that they would be willing to participate in public debates relating to the relevant issues and to introspect on their functioning and on their interpretation of the law.
- iii. A consideration of the relevant recommendations by governments so that they could consider bringing about the recommended changes in administrative processes and practices and, where required, in the law, by moving Parliament.
- iv. A recognition by RTI activists, people’s movements, NGOs and institutions outside the government that in order to improve governance by making the RTI Act more effective, each of them, individually and collectively, would have to play an active role in pushing the government and the adjudicatory authorities to accept and implement the recommendations made here, and take other important steps.
- v. A recognition by the media that they would need to play a proactive role in ensuring that lackadaisical and inept implementation, and ineffective adjudication, do not slowly strangle the RTI Act. Towards this end they would have to run media campaigns on various issues.
- vi. A commitment by progressive, pro-transparency, lawyers that they would appropriately help move the various high courts and the Supreme Court to get orders that could definitively interpret some of the sections of the law that are currently being misinterpreted, and to reiterate those provisions of the law that are being widely ignored and violated.

Statement of Methodology

The findings and recommendations of this report are mainly based on an analysis of orders of the Supreme Court, high courts and information commissions pertaining to the RTI Act and related matters.

In this process all of the 17 Supreme Court orders, that deal centrally with the RTI Act, have been analysed. In addition, a sample of 261 high court, and 1979 information commission, orders have also been analysed. The rationale and methodology for constructing the sample is described below.

Apart from this sample, some Supreme Court and high court orders that did not deal directly with the RTI Act but made observations or gave directions which were relevant, have also been analysed and often cited, described, or even quoted.

To illustrate various issues discussed in this report, occasionally court and commission orders from outside the sample have been used, especially when suitable examples were not found within the sample. A total of thirty SC orders and about 300 HC orders have been cited. The list of orders cited is given in annexure 2.

Apart from this, in chapter 5 a statistical profile of information commissions is presented. For this exercise, the sample used was strictly that which was developed using the methodology described below, so that the profile emerging from the stratified and randomised sample could be postulated as being representative of the whole universe of IC orders.

Sampling of high court orders

For the purpose of the study, orders of all High Courts in India that dealt with various sections of the RTI Act 2005 in the period 2011 -2015 were analysed. For High Courts where less than five orders related to the RTI Act were passed between 2011 and 2015, the search was extended to include relevant orders passed in 2009 and 2010.

Orders were searched using the online database of court orders: *Manupatra.com*. The portal provides a retrievable database of cases across all subjects of law from 1950 onwards.

In order to access relevant HC orders related to the RTI Act 2005, the search function was used to scan the database of all High Courts in India for the time period described above.

Of all the cases found, only those that directly dealt with or had a bearing on any section of the RTI Act were identified to be included in the assessment. A total of 261 cases were finally analysed. Table I lists the number of cases analysed from each HC and the corresponding years.

Sampling of Orders of Information Commissions

For the purpose of this assessment, initially orders of four information commissions (ICs) were analysed:

- Central Information Commission (CIC);
- State Information Commission (SIC) of Rajasthan,

Table I: Sample of HC orders

<i>High Court</i>	<i>Years</i>	<i>No. of orders</i>
Allahabad	2009-2015	10
Andhra Pradesh	2009-2015	7
Bombay	2011-2015	26
Calcutta	2009-2015	10
Chhattisgarh	2009-2015	5
Delhi	2011-2015	71
Gauhati	2009-2015	7
Gujarat	2009-2015	5
Himachal Pradesh	2011-2015	5
Jharkhand	2009-2015	5
Karnataka	2011-2015	13
Kerala	2011-2015	8
Madras	2011-2015	18
Madhya Pradesh	2009-2015	3
Manipur	2009-2015	1
Meghalaya	2009-2015	1
Orissa	2009-2015	7
Patna	2009-2015	3
Punjab & Haryana	2011-2015	25
Rajasthan	2011-2015	10
Tripura	2009-2015	2
Uttarakhand	2009-2015	19
Total		261

- State Information Commission of Bihar and
- State Information Commission of Assam

The assessment covers a randomised sample of orders of all four commissions for 2013-2014 and a sample of orders of the CIC and Assam SIC for 2016.

The analysis of IC orders for April 2013 to March 2014 had been done in 2015, but could not be used for an earlier study because it did not finish in time.

To update the IC orders analysis, a randomised sample of orders of the CIC and the Assam SIC for the year 2016 were freshly analysed and included in the database.

The size of the sample for each IC under review was determined on the basis of the size of the universe (total number of orders passed by each IC during the time period under consideration and publicly accessible through the IC website) and the time and resources available. An initial sample size of 1000 orders for the CIC and 300 each for Bihar and Rajasthan was decided. As Assam had a total of 349 orders in 2013-14, it was decided to include them all.

Unfortunately, when the analysis started, 52 CIC cases, 10 Assam SIC cases, 30 Bihar SIC cases, and 53 Rajasthan SIC cases had to be excluded as they were either interim orders, duplicates, or incomprehensible. Therefore, the total sample size for 2013-14 was finally 1814.

In addition, a total of 165 orders of 2016 were selected subsequently for updating the database, 109 from the CIC and 56 from Assam IC. As some orders turned out to be duplicates, or incomprehensible, or otherwise deficient, finally a total of 1979 orders were analysed (see table II). The sampling methodology is given below.

<i>IC</i>	<i>Year</i>	<i>No. of orders analysed</i>
CIC	2013-14	948
Assam	2013-14	349
Bihar	2013-14	270
Rajasthan	2013-14	247
Total for 2013-14		1814
CIC	2016	109
Assam	2016	56
Grand total		1979

i) Central Information Commission (April 2013 to March 14): About 20,300 orders were passed by the CIC in this period. To select the sample, all the orders were listed separately for each commissioner who passed them, and organised date wise. 5% of the total orders passed by each commissioner were randomly selected by picking out every 20th order.

ii) Bihar IC (April 2013 to March 2014): Around 4490 orders were passed by the information commissioners who were present throughout the period 2013-14. To select the sample, a procedure similar to the one used for the CIC was used.

iii) Assam IC (April 2013 to March 2014): As only 349 orders were passed by the SIC in 2013-14, all of them were included in the sample.

iv) Rajasthan IC (April 2013 to March 2014): About 3900 orders which were passed by the IC were available online. A similar procedure was used to select the sample.

v) Central Information Commission (January 2016 to May 2016): In this period, about 10,200 orders were passed. A similar methodology was used and 109 orders were selected by including 10 orders passed by each commissioner using an appropriate sampling interval.

vi) Assam IC (January 2016 to March 2016): A total of about 530 orders were passed by the SIC in this period. All orders publicly available on the IC website were chronologically arranged and every 10th order was selected to be part of the sample.

Audit of IC websites

In order to ascertain whether ICs proactively disclosed relevant and up-to date information about their functioning, the official websites of all 28 ICs (CIC + 27 SICs) were accessed and analysed. The links for the official websites of ICs were retrieved from the RTI portal of the Government of India¹⁰. Wherever relevant, the performance of ICs has also been compared against the information published in the previous study done by RaaG in 2014.¹¹

Scope of analysis

i) Supreme Court

For the purpose of analysing orders of the SC, the sample of orders were organized based on the sections of the RTI law that they dealt with, or whether they related to administrative, constitutional or other matters.

The orders of the Supreme Court and the High Courts were analysed to examine the following broad questions:

- what qualifies as information under the RTI Act - the definition of information
- who is covered under the RTI Act - which institutions, agencies or organisations are public authorities under the ambit of section 2(h) of the RTI act.
- what information is exempt and what is accessible under the RTI act, and under what conditions
- questions concerning procedural matters arising out of the implementation of the RTI Act, for example can information be requested, or ordered to be given, on the basis of a complaint filed under section 18 of the RTI Act.
- questions related to certain administrative matters, specifically the composition and selection procedure for appointments to the information commission.

The orders were also assessed for precedent value and those that set important precedents, relating to peoples' right to information, were highlighted. Where there was disagreement with the precedents, the reasons for disagreement are recorded in the relevant chapter. Where there were inconsistencies within or among judicial orders, these have been pointed out and discussed.

ii) High Courts

All the questions asked of Supreme Court orders, listed above, were also asked of high court orders. Further, HC orders were analysed as per a format (see annexure 3 for copy).

Further, the orders of the HC were categorized as – (i) Orders which were in keeping with the provisions of the RTI Act or expanded the scope of the law; (ii) Orders which were either not in keeping with or restricted the provisions of the RTI Act in terms of access to information, non-imposition of penalties and granting compensation

iii) Information Commissions

Orders were segregated into appeals, complaints, and combined appeals and complaints. Appeals were further categorised into three types – where the IC ordered:

- full disclosure of information
- part disclosure of information
- upheld non-disclosure or ordered that no information be disclosed

¹⁰ <http://www.rti.gov.in/rti/states.asp>

¹¹ Chapter 9, RaaG and CES, *Peoples' Monitoring of the RTI Regime In India: 2011-13*. 2014. Accessible from <http://x.co/raagces>

Apart from these, appeals in which the IC did not adjudicate on whether information should be disclosed or not, for instance those cases in which information had already been provided, were categorised as “others”.

Similarly, orders related to complaints were categorised on whether the complaint was fully upheld, partly upheld, or rejected. Complaints on which the IC did not adjudicate, for instance those that were remanded back to the FAA or PIO without any adjudication, were categorised as “others”.

Where appeals and complaints were partly or fully rejected, the section of the law cited, and the reasons relied on for denial, were recorded. Further, it was examined whether the rejection was in keeping with the provisions of the RTI Act and whether the orders were well reasoned.

In addition, it was assessed whether the subsidiary directions that formed part of the order were in keeping with the provisions of the law, including whether penalty was imposed in the cases in which it was impossible, whether PIO was directed to give information free of cost after expiry of time frame, and other such.

Each order was also examined to verify whether it recorded basic information related to the case, such as the date on which the RTI application was filed, date of reply of the PIO, date of filing the first appeal, date of the FAA order, date of filing appeal and/or complaint to CIC, date of order of IC, and whether the order described the information sought in the RTI application.

The information gathered from the IC websites, and from the sample of IC orders, was used to develop a statistical profile of the commissions. The statistical profile included the following parameters:

- the number of appeals or complaints received and disposed by the ICs
- the number of pending appeals or complaints
- the estimated waiting time for the disposal of an appeal or complaint
- the number of commissioners in each commission
- availability of annual reports of ICs
- frequency of violations penalised by ICs
- loss to public exchequer in terms of penalty foregone
- percentage of orders suffering from one or more deficiency
- success rate of appeals and complaints
- percentage of orders in compliance with the RTI Act.

Further, for each order, a detailed analysis regarding penalty imposition was undertaken. It was determined:

- whether the order recorded occurrence of any of the violations listed in section 20
- whether penalty was impossible
- if impossible, quantum of penalty impossible
- whether a show cause notice was issued
- whether any order was passed subsequent to the show cause notice
- whether penalty was imposed
- quantum of penalty imposed
- if penalty was not imposed, were valid reasons for non-imposition recorded in the order
- loss to the ex-chequer in terms of penalty foregone.

The report highlights the procedural or legal errors made by information commissioners in their orders, giving reasons why they were considered errors. These errors were not only linked to relevant provisions of the law but, where appropriate, to legal precedents in SC and HC orders.

For the format used to characterise and analyse IC orders, please see annexure 4.

System of citation followed in the report

The SC orders have been cited in the report as “SC”, followed by the name of the first petitioner and, finally, the year in which the order was passed. In case the name of the petitioner was common, like the Union of India (UOI), the name of the first respondent was also mentioned in addition to the name of the petitioner.

The HC orders have been cited in the report as “HC”, followed by a hyphen, and then an acronym of the name of the High Court which passed the order, followed by the name of the first petitioner and finally the year in which the order was passed. In case the name of the petitioner was common, like the Union of India (UOI), the name of the first respondent was also mentioned in addition to the name of the petitioner. Lists of the SC and HC orders cited, providing the citations used in the report, the usual citations used in judicial orders, and the web link where a copy of the order is available, are at annexure 2.

IC orders have been cited in the report as “CIC”, or as “SIC” followed slash (/) and then the abbreviated state name, then the order number, and then the date of the order, all separated by slashes. Using this information, the specific orders can be retrieved from the websites of the respective ICs.

PART I. OVERARCHING ISSUES

1. Quality of orders

Major Issues

“...it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

This famous quote from a 1924 British court order¹² is perhaps even more pertinent today than it was when it was originally uttered. It not only reiterates the need for judges to be without bias and also appear to be without bias, as was its original purport, but highlights the need to have judgements that are detailed and transparent in their reasoning. Therefore, it is not enough that a just order be passed, the order must be so worded that everyone can understand its basis and thereby recognise its justness.

This is especially relevant to statutes like the RTI Act which are mainly used by common people, mostly without the involvement of legal professionals, and are among the few laws designed to empower the public to seek government accountability, unlike most others that empower governments to regulate public action.

Also, in institutions like courts and information commissions, there will inevitably be variations in how different benches, or the same bench at different times, interpret various provisions of a law. This is even more so where a statute has been recently enacted and case law is still evolving, as it is for the RTI Act in India. As judges give detailed reasons why they interpret the statute in the manner that they do or, where relevant, why they disagree with other judges, jurisprudence evolves and matures to a point where such differences are minimised and, what few remain, are adjusted within the body of law by making subtle, nuanced distinctions which allow two or more seemingly contradictory interpretations of a statute to coexist. The judicial convention of always making way for interpretations of higher courts or of larger benches in equivalent courts, also helps in minimising chaos.

The problem becomes acute when benches choose to depart from the generally accepted interpretation of the law and decline to give reasons why they think it proper to do so. Some of the judicial orders, both of the Supreme Court and of various high courts, and many of the orders of information commissions, seem to either ignore the relevant provisions of the law or give interpretations that are not easily understood, often unexplained, and sometimes seem wrong.

For the rule of law to prevail, people must understand the general principles that underlie the pronouncements of the courts so that they can aspire to comply with them. Subordinate and equivalent forums also need to reflect on the reasoning of higher forums and effectively adopt it, thereby reducing unnecessary confusion and disagreements within the judiciary.

It is well recognised today that there needs to be a public debate on orders of the judiciary. But in order to facilitate this, judicial orders must provide, and in a language that people can understand, a detailed basis for their decisions. Besides, it is also recognised that if the affected parties in any litigation are to get some closure and mental peace, it is important for them to understand the reasons behind the orders of the courts and not be left with a feeling that they were wronged, even if that was not actually so.

For these, and many other reasons, some of which are highlighted in the SC orders described below, the importance of judicial (and other) orders that are clear, well-reasoned, and detailed, cannot be exaggerated. Similarly, to sustain the credibility of the judicial system, such orders must be within the

¹² *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)

acceptable limits of jurisprudence, as laid down by the Supreme Court in some of the landmark judgements described below.

Unfortunately, an overwhelming proportion of information commission orders analysed as part of the study were so devoid of reasoning and factual details that it was often impossible to determine which sections of the law they were invoking to deny information or condone the PIO's decision, action, or inaction. One consequence of this was that while analysing how courts and commissions interpreted different sections of the RTI Act, it often became difficult to classify and analyse IC orders.

Though there are thousands of IC orders, a few hundred high court orders, and less than twenty Supreme Court orders, directly dealing with the RTI, in most chapters there is much greater mention of judicial orders than of commission orders. This is because of the earlier described inability to properly analyse a large proportion of orders of ICs. More than 60% of IC orders from across the country were too cryptic and opaque to stand up to any type of scrutiny, especially public scrutiny, as is discussed in chapter 5(i).

Apart from the HC orders discussed in this chapter, other examples of orders of HCs that seem inadequately reasoned, lack essential facts, and/or go beyond the law include *HC-BOM Dr. Celsa Pinto 2007*, discussed in chapter 6(b) below; *HC-ORI North Eastern Electricity Supply Company of Orissa Ltd. 2009*, discussed in chapter 7(c) below; *DEL-HC Prem Lata 2015*, discussed in chapter 9(e) below; *HC-GUJ Thakor Sardarji Bhagvanji 2014* discussed in chapter 10(a) below; *HC-ALL Alok Mishra 2012*, discussed in chapter 10(b) below; *HC-DEL Ajay Madhusudan Marathe 2013*, discussed in chapter 14(a) below.

a) Inadequately reasoned orders

If we accept the Aristotelian definition of humans being “rational animals”, then we would also understand why the seeking of reasons and justifications is a universal preoccupation of human beings. Even seemingly fatalistic people, if pushed, attribute happenings to past actions, or to the will of God, or some such. We all seem to be conditioned to believe that every event has a cause, and to further seek the cause *ad infinitum*.

Therefore, it is not surprising that there is great agitation in the minds of people if decisions are thrust upon them, especially decisions that they do not agree with, and which offer no detailed reasoning. The decisions of RTI adjudicators are no exception to this.

The Judiciary

The Supreme Court, in numerous orders, has cautioned against the tendency to give cryptic, unreasoned orders. In *SC Manohar 2012* the SC categorically, and in great detail, laid down that judicial, quasi-judicial, and even administrative orders must contain detailed reasoning for their decisions. In keeping with this dictum, the SC went on to quote extensively from an earlier SC order which listed detailed reasons why orders must be speaking and reasoned.

“18. In the case of Kranti Associates (P) Ltd. and Ors. v. Masood Ahmed Khan and Ors. [MANU/SC/0682/2010 : (2010) 9 SCC 496], the Court dealt with the question of demarcation between the administrative orders and quasi-judicial orders and the requirement of adherence to natural justice. The Court held as under:

“47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be

done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'."

Further, as quoted in **HC-BOM SEBI 2015:**

"3...The Apex Court in S.N. Mukherjee v. Union of India MANU/SC/0346/1990: [1990] 4 SCC 594 has observed in para 35 as under: --

"35. The decisions of this Court referred to above indicate that with regard to the requirement to record reasons the approach of this Court is more in line with that of the American Courts. An important consideration which has weighed with the court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Courts under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making. In this regard a distinction has been drawn between ordinary courts of law and tribunals and authorities exercising judicial

functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.””

Many High Courts have also stressed the need for reasoned orders, especially from information commissions. In **HC-DEL THDC 2013** the Delhi High Court decried the lack of reasoning in a CIC order and remarked that reasons link the material placed before the adjudicatory authority with the conclusions it arrives at. The lack of reasons makes an order illegal:

“9.1...The order of the CIC is cryptic and sans reasons. The impugned direction contained in the CIC's order in paragraph 6 only adverts to the fact that such a directive had been issued in other cases and, therefore, the petitioner ought to be supplied information with regard to DPC proceedings. Reasons are a link between the material placed before a judicial/quasi-judicial authorities and the conclusions it arrives at. (See Union of India vs. Mohan Lal Capoor, MANU/SC/0405/1973 : 1974 (1) SCR 797 at page 819 (H) and 820 (B, C & D)]. The failure to supply reasons infuses illegality in the order, and thus deprives it of legal efficacy. This is exactly what emerges on a bare reading of the impugned order.”

In **HC-P&H Dr. M.S. Malik 2013**, the Punjab and Haryana High Court sent back a CIC order to the CIC, as the HC's considered view was that the order was not a reasoned one and the specific issue to be determined, whether the asked for information was exempt or not under section 8, was not even examined.

“8. In the impugned order dated 12.1.2011, the only relevant reasoning recorded is to the following effect:

We fully agree with the contention of the respondents that, if disclosed, these notings could impede the prosecution of the accused persons.

9. The scope of the adjudicatory functions of the Authorities under the Act including the Central Information Commission came up for consideration before the Hon'ble Supreme Court in a recent judgment titled as Namit Sharma v. Union of India, MANU/SC/0744/2012 : 2012 (4) RCR (Civil) 903. It was clearly held that at the stage of second appeal i.e. the Information Commission (Central/State) performs adjudicatory functions which are specifically oriented and akin to a judicial determinative process. It was further held that the application of mind and passing of reasoned orders are inbuilt into the scheme of the Act.

10. This Court is of the considered view that the impugned order dated 12.1.2011, Annexure P7, passed by the Central Information Commissioner is not a reasoned order and the specific issue of determination as to whether the information sought by the petitioner fell under any of the exemptions under Section 8 of the Act has not even been examined.

11. For the reasons recorded above, the order dated 12.1.2011 passed by the Central Information Commission, Annexure P7, is set aside. The matter is remanded back to the Central Information Commission, New Delhi for passing of orders afresh after affording opportunity of hearing to the parties concerned and by limiting the scope of adjudication of the second appeal preferred by the petitioner strictly within the jurisdiction conferred by the provisions of the Act. It would be appreciated if such fresh decision is taken expeditiously and, in any case, within a period of six months from the date of conveying of a certified copy of this order. Petition allowed in the aforesaid terms.”

In **HC-P&H Satpal Singh 2011**, the HC held that an appellate authority was legally required to indicate valid reasons for arriving at a conclusion.

“17. Thus, the impugned order (Annexure P-13) is non-speaking, which lacks application of mind. Such Appellate Authority ought to have discussed the material on record and was legally required to indicate the valid reasons, for 'arriving at a correct conclusion, in order to decide the real controversy between the parties, in the right perspective. It is now well-settled principle of law that every action of such authority must be informed by reasons. The order must be fair, clear, reasonable and in the interest of fair play. Every order must be confined and structured by the rational and relevant material on record, because the valuable rights of the parties are involved.

18. Exhibiting the importance of passing speaking and reasoned order, the Hon'ble Apex Court in case *Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Sharon Varshney and Others*, MANU/SC/0468/2009 : (2009) 4 SCC 240 has held (Para 8) as under:-

“The purpose of disclosure of reasons, as held by a Constitution Bench of this Court in S.N. Mukherjee v. Union of India, is that people must have confidence in the judicial or quasi-judicial authorities. Unless reasons are disclosed, how can a person know whether the authority has applied its mind or not? Also, giving of reasons minimizes the chances of arbitrariness. Hence, it is an essential requirement of the rule of law that some reasons, at least in brief, must be disclosed in a judicial or quasi judicial order, even if it is an order of affirmation”

Despite all this, at least one order of the Supreme Court, and two orders of high courts, had either insufficient reasoning or arguments that seemed beyond the comprehension of a common person. In **SC UPSC 2013**, the Supreme Court examined requests for information by job candidates about other candidates (third parties), specifically about their qualifications and experience. These were denied by the UPSC citing, among other reasons, section 8(1)(e) of the RTI Act, claiming a fiduciary relationship exists between the examining body and the examinee. The SC upheld this denial, but based its verdict on **SC CBSE 2011**, quoting an extract from this judgement in support of their decision, and giving no other reason or justification, or even an explanation on how the cited SC order justified the decision that a fiduciary relationship existed between the examining body and the examinee, such that it precluded the public disclosure of details of the experience and qualifications of various candidates.

In fact, in **SC CBSE 2011**, the Supreme Court made three relevant statements¹³:

“In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination...”

“But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(e) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a Director of a company with reference to a shareholder, an executor with reference to a legatee, a Receiver with reference to the parties to a lis an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body.” (emphasis added).

“It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer books are evaluated by the examining body.”

“...even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself.

In short, while admitting that in a “philosophical” and “very wide” sense examining authorities can be seen to be in a fiduciary relationship with examinees, they are not so in the specific sense referred to in section 8(1)(e) of the RTI Act, at least with reference to answer books. Further, that even if it was assumed that there was such a fiduciary relationship, it would not prohibit the sharing of an examinees own answer book.

¹³ Relevant extract of the SC order at annexure 7(a).

In **SC UPSC 2013**, the SC was examining whether there was a fiduciary relationship existing between the examinees and the examining body such that it prevented the examining body from disclosing information on qualifications and experience supplied by the examinees to the examining body. However, the Supreme Court in the earlier cited judgement (**SC CBSE 2011**) neither held that such a fiduciary relationship existed between the examining body and the examinee, in the sense envisaged in the RTI Act, nor did it examine the question of whether such a fiduciary relationship would prohibit the making public of the experience and qualification of candidates. Therefore, it is not clear how this judgement could be taken as the basis for the SC judgement in **SC UPSC 2013**.

Without expressing a view on the merits of the position taken by the Supreme Court in **SC UPSC 2013**, all that can be said is that the order did not provide any reasons for the decision it contained, and that even the quotation from an earlier SC order, reproduced in this order, did not seem to be relevant to the conclusion drawn. This was all the more puzzling as the information being sought was such that it would ordinarily not be considered private or otherwise sensitive. After all, the qualifications and experience of people is usually in the public domain and often on visiting cards and even on name boards. Clearly, detailed reasoning was needed if they were to be exempted from disclosure.

Besides, the public disclosure of such information would help in preventing frauds, such as the recent case of a former law minister in the Delhi government who allegedly made a false claim to be a qualified lawyer, till his credentials were made public.

Similarly, in **HC-ALL Khurshidur Rahman 2011** the Allahabad High Court upheld the rejection by the CIC of an RTI application requesting, among other things, the names of the political parties that supported Manmohan Singh for Prime Ministership, those that gave support unconditionally, and the number of MPs they each had. On the face of it this information should have been a part of public records held by Parliament and the president's office, and there appeared to be no reason why it could not be accessed. However, the HC held:

"4. We have perused both the orders passed by the appellate authority as well Central Information Commission. The questions which have been raised by the petitioner could not have been replied since information as sought is not maintained within the definition 2(f) under the Right to Information Act 2005. We are of the view by making such application petitioner has unnecessary wasted the time of the authorities who are entrusted with obligation for providing information. Raising such issues in the writ petition cannot be approved and the writ petition deserves to be dismissed and it is hereby dismissed with costs."

Though the applicant had also asked for the opinion of the public authority on other matters, which was rightly judged to not qualify as information, the public and the petitioner was left mystified as to why the information regarding political parties was deemed not to be information under section 2(f).

In **HC-BOM RBI 2011** the Bombay High Court (Goa bench) rejected the order of the SIC and held that certain reports of the RBI dealing with the performance of a bank were exempt and therefore should not be disclosed. The HC went on to hold:

"17. At this juncture, respondent No. 1 Mr. Rui Ferreira, who argued the matter in person states that he has already received 16th and 17th reports, which are said to be exempted from the disclosure and that he has already given it to publish them. In the circumstances, the said respondent is directed not to make any further use of the said reports. The said respondent further states that he does not have the copies of those reports and he has distributed them to the press. In the circumstances, respondent No. 1 is directed not to make any further use of the said reports and is further directed not to refer to the said reports from any custody subject to the result of the appeal."

Though, admittedly, the HC had the power to overturn the orders of the IC if it found them to be in violation of the law, in this case the HC gave no basis for the gag order pertaining only to the applicant, and did not explain what purpose it would serve, as the order was not made applicable to all the others who had

a copy of the reports. The HC also gave no justification for putting the applicant at a disadvantage by forbidding him from using the reports, while everybody else was free to do so.

Interestingly, some years later, in **SC RBI 2015**, the Supreme Court held that all such reports on the performance of banks, prepared by the RBI, were definitely not exempt from disclosure under the RTI Act, and further held that it was actually in public interest to disclose them!

Information Commissions

The phenomenon of ICs not passing speaking orders is problematic for at least five reasons. First, information seekers, the concerned public authorities, and the public at large, have no way of finding out the rationale for the decisions of ICs. People have a right to know not just the decision, but also the basis of the decision. In fact, even the RTI Act makes it obligatory for a public authority under section 4(1)(d) of the Act, to proactively “provide reasons for its administrative or quasi-judicial decisions to affected persons”. In the case of an IC order, whereas information seekers and concerned public authorities are no doubt “affected persons”, even the general public is an affected party, as often decisions have far reaching consequences on the public’s right to access information. Therefore, passing a non-speaking order, which only records the decision of the IC but does not provide the reasons for its decisions or other relevant details, is a violation of peoples’ right to information and goes against the fundamental principles of transparency.

Second, in several cases IC orders claimed that their decision was in accordance with judgements of the Supreme Court or of high courts, without citing which judgement, leave alone quoting the relevant portion. This makes it impossible for anyone to understand the basis of the decision, given that people and public authorities cannot reasonably be expected to be aware of all judicial pronouncements and deduce which one the IC might be relying upon. Also, it cannot be determined whether the judicial judgement was interpreted and applied appropriately to the case at hand.

Third, orders of ICs are often challenged before courts. The tests of legality, fairness and reasonableness become exponentially more difficult to pass when the orders don’t speak for themselves and lack essential information, facts and reasoning. This is especially problematic as information commissions are often not made a party in legal challenges to their orders before the court (there are differing legal opinions on this matter), and therefore they have no opportunity to present any material in defence of their directions, which is not contained in the original order. In any case, as IC orders are supposed to be self-contained, it is unlikely that any records would exist with the commission that could be presented before the court to explain the reasoning behind cryptic orders. Reasons provided after the order, whether verbally or on the basis of additional documents, would in any case not be considered part of the original order which was under challenge. Deficiencies in IC orders also burden the information seekers with the task of defending orders of the ICs before courts.

Vague use of language, insufficient or incorrect recording of facts and not recording basis of orders, weigh in in favour of the petitioner assailing the order of the commission. This assessment found that in several cases, orders of ICs were set aside by courts due to lack of reasoning or because orders were *ultra vires* of the Act. If this becomes a regular occurrence, public trust in the ICs could rapidly decline. If orders are well reasoned and gave the basis of decisions, even if they were set aside by the courts, they would invoke public debate and would even encourage people to challenge judicial verdicts which set aside logical and properly reasoned orders.

Fourth, deficient orders prevent effective public scrutiny and accountability of the institution of information commissions and the performance of information commissioners.

Finally, deficient orders have little value in terms of furthering the cause of transparency outside the scope of the limited order. Rather than the decision itself, it is the enunciation of reasons, logic and basis of the decision which create public awareness and lead to public debates about enhancing the scope of transparency and accountability in the country.

Well-reasoned orders would go a long way in building public trust in the institutions of ICs and furthering the cause of transparency. Despite this, a very large number of IC orders continue to give no reasons for their decisions. Some typical examples are reproduced below.

Through an RTI application, an applicant had sought information related to a certain MIS solution implemented by the Punjab National Bank. The PIO denied information under section 8(1)(d) of the RTI Act on the grounds of commercial confidence, disclosure of which would harm the competitive position of the bank as well as the vendors. The FAA upheld the response of the PIO. In its order, without recording or even discussing how disclosure would harm commercial confidence or competitive position, even though the applicant highlighted that other banks had disclosed the same information, the IC simply dismissed the appeal recording:

*“The decision of the CPIO was agreed to by the FAA. There is no sufficient reason to interfere with the order of the FAA. **Decision:** The intervention of the Commission is not required in the matter. Order of the FAA is upheld.” (CIC/000827 dated 26.6.2013)*

In an order of April 2014, the CIC summarily upheld the decision of the PIO to deny information citing section 8(1)(g) of the RTI Act. The IC failed to summarise the information sought and also did not record or adjudicate upon the reasons for the rejection of information. Section 7(8) of the RTI Act obliges PIOs to inform applicants about the reasons for rejection if the RTI application is wholly or partly rejected under sections 8 or 9 of the RTI Act. The relevant extract of the order is given below:

“It is to be seen here that the appellant, vide his RTI Application dated 17.04.2012, sought some information from the respondents on four issues as contained therein. Respondents vide their response dated 23.05.2012, denied the required information to the appellant on all four issues. Being aggrieved by the aforesaid response, FA was filed by the appellant on 25.06.2012 before the FAA, who vide his order dated 24.07.2012, upheld the decision of CPIO. Hence, a Second Appeal before this Commission. It is to be seen here that CPIO vide his letter dated 23.05.2012 denied the information to the appellant on his RTI Application by taking a plea u/s 8 (1) (g) of the RTI Act 2005, stating thereby, that disclosure of the required information would endanger the life or physical safety of any person or would identify the source of information or assistance given in confidence for law enforcement or security purposes... The Commission is of the considered view that there is no legal infirmity either in CPIO's order or in the order of FAA. As such, their views are hereby upheld. In view of this, the appellant's appeal becomes redundant in this regard. Therefore, it is dismissed.”(CIC/003589 dated 21.04.2014)

In another matter, the appellant filed an RTI application seeking information about an enquiry conducted by an ACP against a constable. The appellant was the brother of the constable. The PIO, denied copies of the documents under section 8(1)(h) of the RTI Act, 2005. During the CIC hearing, the PIO stated that the spouse of the constable had filed another RTI application, following which the public authority had provided a copy of the enquiry report. The PIO contended that as the enquiry report, i.e., the document sought by the appellant, has already been provided, the matter may be allowed to close.

Ignoring the obvious contradiction of denying the report citing 8(1)(h) in one instance, and disclosing it in another RTI matter, and also ignoring the illogical claim that as the information had been provided to a relative, the matter may be closed, the IC decided, *“Intervention of the Commission is not required in the matter”*. The decision to dismiss the appeal meant that the IC upheld the denial of information in this case under Section 8(1)(h). There was no discussion of the reasons and circumstances which would justify such a denial. Further, the actions of the PIO should have in fact invited penal action under Section 20(1), as the denial

of information was illegitimate and it would be up to the PIO to establish that it was bonafide, especially as the same information was, in fact, disclosed to another applicant. No reasons were offered to disregard all these mandatory provisions of the law (**CIC/001175 dated 31.01.2014**).

An applicant sought inspection of records maintained by a kerosene dealer shop under the Public Distribution System, including sale records, cash memo register, shop registration and inspection book. Inexplicably, the SIC in its order held that the information sought did not fall within the definition of information and therefore, could not be provided. Further, the SIC held that the purpose of the RTI Act was to tackle corruption and that if RTI users were allowed to inspect the records held by ration dealers, then corruption would in fact be encouraged and would rise! Clearly, registered ration shops are required to maintain these records under the relevant laws and regulations, and periodically submit them to the government. Even though the information sought was clearly in public interest, yet the IC denied the information without citing any legally valid reasons or justifications, or any specific exemptions under the RTI Act (**SIC/BIH/61129 dated 13.05.2013**).

During the hearing of the appeal for another case, at the SIC, an applicant pointed out that the PIO had not provided information in response to point 2 of the RTI application. The IC dismissed the plea and held that in his opinion information had been provided. The order does not record the information sought and the reply provided and therefore, it is not possible to judge the veracity of the order of the IC. Further, since the appellant specifically raised a concern about point 2 of the RTI Application, the IC should have summarised the information sought and the reply given by the PIO and then recorded his findings on the basis of these facts (**SIC/BIH/60099 dated 10.07.2013**).

In several orders, the IC, after recording the contention of the PIO and the applicant, in its decision only gave its direction without recording its findings on the matter and the reasons for the particular direction. A favourite one-line phrase found in several orders appeared to be, "Intervention of the Commission is not required", in order to dismiss the appeal/complaint. Similarly, several orders only contained the direction, "The decision of the PIO/FAA is upheld", again without recording the finding of the IC and the reasons for its decisions (see: **CIC/000792 dated 20.06.2013; CIC/001279 dated 14.08.2013; CIC/000357 dated 31.12.2013; CIC/001175 dated 31.1.2014; CIC/001084 dated 25.07.2013**).

Sometimes IC orders are so worded that they leave the public wondering whether they are better off without having to decipher the reasoning of the commission! One such order is described below. In this case, a person argued that an NGO was a PA as it received funding of more than ₹ 1 crore from the government which was about 5% of the total funding of the organisation. The Commissioner held that ₹ 1 crore or 5% cannot be construed to be substantial funding. However, the CIC went on to argue that:

"It would be pertinent to mention here that amount one crore or above or 5% of their portfolio is not worth to be construed as substantially funded or not. But what should be the criteria to be construed as substantially financed, will be such percentage which would not be seen as such but it should be actually substantially financed in a real sense by taking all other financial aspect of a particular NGO that may differ case to case. It is immaterial whether it is 10%, 20% or 30% etc. but definitely not below 10% of total overall financial portfolio of the particular NGO." (**CIC/000593 dated 15.01.2014**).

Such orders of the Commission confound and confuse, and serve no purpose.

b) Orders lacking essential facts

Most of the judicial orders follow a format that ensures that the basic relevant facts are recorded in the order even before the merits are discussed. Unfortunately, this sound practice has not been adopted by most information commissions.

Information Commissions

Despite the burden of numerous supreme court and high court orders to the contrary, IC orders continue to be paradigms of opaqueness. Apart from the absence of reasons, IC orders are also plagued by the absence of basic information.

In order to stand the test of public and judicial scrutiny, the orders of the ICs must record all relevant facts, including the background of the appeal/complaint. An overwhelmingly large percentage of the IC orders analysed were found to be deficient in terms of documenting basic facts related to the case.

More than 60% of the orders analysed contained deficiencies in terms of not recording critical facts (see chapter 5(i)). In fact, many of the orders comprised just 2-3 lines recording only the decision of the IC, without any reference to the background or the relevant facts of the case like dates, details of information sought, and decision of PIO/ FAA.

Some orders of ICs that typify the many cryptic and inadequate orders given by ICs, are described below.

In an order dated 08.07.2013, the CIC did not record the date on which application was filed, details of information sought and details of the reply of the PIO. The Commissioner merely allowed inspection of documents without any comment on the seeming violation in terms of the delay in disclosing information. It is unclear why inspection instead of copies of records was ordered by the IC and whether inspection was actually sought by the applicant. The complete order is reproduced below-

“Heard today dated 08.07.2013. Appellant present. The Factory is represented by Shri Ramji Gupta, JWM. The parties are heard and the records perused. After hearing the parties, the CPIO is hereby directed to give inspection of the application forms and other documents submitted by the selected candidates in the examination held for recruitment of Leather Workers in the year 2012. This order may be complied with in 03 weeks time.” (CIC/000907 dated 08.07.2013)

In another order, the CIC ruled that:

“In the RTI application dated 2.1.12, the appellant had sought information on three paras. Dr.Mukesh Kumar submits that information on para 2 has been provided to the appellant. As regards para 1, he submits that this information has not been provided to the appellant as it is confidential information. I do not agree with Dr.Mukesh Kumar. If the requested information is available with the University, it may be supplied to the appellant. If not, the appellant may be informed accordingly. The appeal is disposed of on above terms.” (CIC/000026 dated 19.06.2013)

It is left to the imagination of the public why information sought in para 3 was not mentioned in the order – was it because the information was already provided or that the IC felt that it was exempt under the law and therefore did not direct the PIO to provide it. Similarly, it is unclear what information was sought in para 1 and why the IC did not ascertain whether the information sought was available in the university or not, and ought it to have been available, before giving the vague direction.

The Assam IC while hearing an appeal against the DRDA, allowed only partial disclosure of information sought, stating:

“Point No.5: The information sought for against this point could neither be understood by the Public Authority nor be explained by the appellant. As such no information was required to be furnished against this point... Point Nos.8, 9 & 10: These were hypothetical questions and hence not within the purview of the RTI Act.” (SIC/ASS/NGN.77/2011 dated 07.03.2013)

The absence of any details recorded in the order regarding information sought by the applicant, makes it impossible to judge whether the information sought was correctly rejected.

The Bihar SIC passed several one-line orders, simply stating that the information sought does not fit within definition of information. No rationale was provided in the orders for the decision of the IC nor did the orders mention the relevant section of the Act relied upon to deny information. Further, the orders did

not describe the information sought. (*See- SIC/BIH/86983 dated 20.12.2013; SIC/BIH/86336 dated 10.07.2013; SIC/BIH/82927 dated 10.07.2013*)

Tabulated at the end of the chapter (Box 1) is a list of all the details and reasoning that, as a minimum, orders of the information commission should invariably contain (also see Box 17 in chapter 28 for a similar checklist for orders relating to penalties).

c) Orders going beyond the law

Unfortunately, there has been a tendency among PIOs and adjudicators to exempt information from disclosure citing sections of the RTI Act that did not allow for such exemptions. Two sections of the RTI Act that were often so misused were section 7(9) (disproportionate diversion of resources), and section 11(1) (third party information), neither of which could by themselves be used to deny information. Though less often, “*sub-judice*” was also cited as a basis for denying information, perhaps as a misunderstanding of section 8(1)(b), which actually exempts from disclosure “*information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court.*”

There was also a tendency to very widely and loosely interpret sections of the RTI Act to justify exempting, from disclosure, all sorts of information that perhaps deserved better. As discussed in later chapters, the all-time favourites were “fiduciary relationships”, section 8(1)(e), and “unwanted invasion of privacy”, section 8(1)(j), both of which dealt with concepts that have defied all attempts to be defined precisely and unambiguously.

The most disturbing trend was of inventing exemptions that were not a part of the RTI Act. This was despite the fact that there are many court orders that caution against this very form of judicial adventurism.

The Judiciary

In ***SC Manohar 2012***, the Supreme Court held that when the grounds provided in the law were exhaustive, then the court or any other adjudicatory agency was not empowered to add to this list, on their whim and fancy.

“27...The grounds stated in the Section are exhaustive and it is not for the Commission to add other grounds which are not specifically stated in the language of Section 20(2)... To put it simply, the Central or the State Commission have no jurisdiction to add to the exhaustive grounds of default mentioned in the provisions of Section 20(2). The case of default must strictly fall within the specified grounds of the provisions of Section 20(2). This provision has to be construed and applied strictly. Its ambit cannot be permitted to be enlarged at the whims of the Commission.” (emphasis added)

In ***SC CIC Manipur 2011*** the SC, while quoting various SC orders, held that interpretation of laws must follow some rules and courts must not consider words in a statute as inappropriate or surplus, especially if there are interpretations within which they could be appropriate or required. It went on to say that courts should not interpret provisions of statutes in a manner such that they would be without meaning or relevance. The SC went on to reiterate that courts must presume that the Parliament has inserted each provision of a law with a purpose, and that their intention is that each part of the law must be effective.

*“38.....Reference in this connection may be made to the decision of this Court in *Aswini Kumar Ghose and another v. Arabinda Bose and another - AIR 1952 SC 369*. At page 377 of the report Chief Justice Patanjali Sastri had laid down:*

“It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute”.

*39. Same was the opinion of Justice Jagannadhabas in *Rao Shiv Bahadur Singh and another v. State of U.P. - AIR 1953 SC 394* at page 397:*

“It is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render

a part of the statute devoid of any meaning or application”.

40. *Justice Das Gupta in J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of Uttar Pradesh and others - AIR 1961 SC 1170 at page 1174 virtually reiterated the same principles in the following words:*

“the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect”.

41. *It is well-known that the legislature does not waste words or say anything in vain or for no purpose. Thus a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons.”.*

In **SC Thallapalam 2013** the SC cited a large number of SC orders and cautioned courts against taking over the legislative function in the guise of interpreting laws. It held that courts must not interpret a provision of the law based on “*an apriori determination of the meaning*”, or based on their pre-conceived notions, or on the basis of ideologies. In fact, the SC went on to reiterate that if the words in a statute can rightly or commonly be understood in one way only, then it was not open for a court to give them some other meaning on the plea that such a meaning was more consistent with the objective of the statute.

*“12....In **Magor and St. Mellons Rural District Council v. New Port Corporation** (1951) 2 All ER 839(HL) stated that the courts are warned that they are not entitled to usurp the legislative function under the guise of interpretation. This Court in **D.A. Venkatachalam and others v. Dy. Transport Commissioner and others** (1977) 2 SCC 273, **Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and others** (2001) 4 SCC 139, **District Mining Officer and others v. Tata Iron & Steel Co. and another** (2001) 7 SCC 358, **Padma Sundara Rao (Dead) and others v. State of Tamil Nadu and others** (2002) 3 SCC 533, **Maulvi Hussain Haji Abraham Umarji v. State of Gujarat and another** (2004) 6 SCC 672 held that the court must avoid the danger of an apriori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provisions to be interpreted is somehow fitted. It is trite law that words of a statute are clear, plain and unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences, meaning thereby when the language is clear and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the statute speaks for itself. This Court in **Kanai Lal Sur v. Paramnidhi Sadhukhan** AIR 1957 SC 907 held that “if the words used are capable of one construction only then it would not be open to courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.”*

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“43.....Court cannot, when language is clear and unambiguous, adopt such a construction which, according to the Court, would only advance the objective of the Act.”

The High Courts did not lag and, in a large number of orders, stressed the need for courts and information commissions to not transcend the settled boundaries for interpreting statutes.

In **HC-DEL Dr. Neelam Bhalla 2014**, the Delhi High Court reiterated that that the IC was not allowed to carve out exemptions on its own.

“3. Having heard learned counsel for the petitioner, this Court is of the view that once the CIC has held that DRDO is an exempted organisation under Section 24 of RTI Act and the information sought does not pertain to corruption and/or human rights violation, it was not open to the CIC to carve out any further exemption....”

*“4. In **Gurudevdattha VKSSS Maryadit and Others Vs. State of Maharashtra and Others, MANU/SC/0191/2001 : (2001) 4 SCC 534 the Supreme Court has held as under:-***

“”26...The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts

should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses... ”. (Emphasis supplied)”

Interestingly, in **HC-KER K.Natrajan 2014**, the Kerala High Court stressed the role of punctuation in properly interpreting a statute.

“12. In statutory interpretation 'punctuation' also plays an important role. When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to punctuation. In Section 17(2) of the RTI Act, 2005, the two phrases, i.e., "the Governor may suspend from office" and "if deem necessary prohibits also from attending the office during enquiry" are punctuated by a 'coma'. The punctuation 'coma' separates the above two phrases and the words "prohibits also from attending the office during enquiry" are contained in the second phrase, which is separated by 'coma'. Thus, the words "during enquiry" cannot be read in both the above phrases, which are separated by a 'coma'. The Apex Court has occasion to interpret the use of punctuation 'coma' in several cases. In this context, reference is made to the Apex Court judgment in M.K. Salpekar v. Sunil Kumar Shamsunder [MANU/SC/0148/1988 : (1988) 4 SCC 21]. In the above case, the Apex Court had considered Clause 13(3)(v) of the C.P. and Berar Letting of Houses and Rent Control Order, 1949. The above provision prohibits eviction of tenant on the ground that "tenant has secured alternative accommodation, or has left the area for a continuous period of four months and does not reasonably need the house". In holding that the requirement that the tenant "does not reasonably need the house" has no application when he "has secured alternative accommodation...”

“13. Again in Sama Alana Abdulla v. State of Gujarat (MANU/SC/0143/1996 : AIR 1996 SC 569), the Apex Court, construing the words "any secret official code or password, or any sketch, plan, model etc., held that the presence of 'comma' after password showed that the adjective 'secret' only qualified the expression "official code or password”.

Despite this, in orders like those described below, the High Court seemed to uphold or even introduce exemptions that appeared to be absent from the RTI Act. How far this is acceptable requires a wider, and perhaps a better informed, debate than is possible here.

In **HC-ALL Alok Mishra 2012** (quoted more fully in chapter 10(b)) the Allahabad HC seemed to hold that despite the fact that applicants were not required to give any reasons for seeking any particular information, if they chose to approach the HC under Article 226 of the Constitution, then they must have a “bona fide purpose” for seeking the information.

“6. Once the petitioners have chosen to seek directions by filing a writ petition under Article 226 of the Constitution of India, which is a discretionary constitutional remedy to be used for bona fide purposes they must satisfy the Court, that they have approached the Court with bona fide purposes with clean hands.”

In **HC-BOM Principal, Nirmala Institute of Education 2012**, the Bombay High Court (Goa bench) held that that unless a body was declared to be a public authority under the RTI Act by the (state) government, it did not come under the purview of the RTI Act. Therefore, as the respondent institution was not so declared when the RTI application was filed or when orders were issued by the SIC, the orders of the SIC stand quashed.

However, section 2(h) of the RTI Act does not require such a notification by the government but, instead, lays down conditions that qualify a body to be a public authority under the RTI Act. Therefore, the question should have been whether the Nirmala Institute of Information met with any of these conditions (like being substantially funded by the government or being under the control of the government, etc.) and not whether the government had notified it to be a public authority. This also seems to be the settled legal position.

In **HC-BOM SIC, Nagpur bench 2012**, the Bombay High Court (Nagpur bench) stated in its order:

“5...We had asked the respondent while hearing of this letters patent appeal as to what action did the respondent take in pursuance of the information sought by the respondent after the information was supplied and it was replied by the

respondent appearing in person that nothing was done on the basis of the information supplied by the appellants as there was some delay in supplying the information. It is really surprising that thousands of documents are being sought by the respondent from the authorities and none of the documents is admittedly brought into use. We are clearly of the view in the aforesaid backdrop that the application was filed with a mala fide intention and with a view to abuse the process of law.”

This seemed to violate the spirit and letter of section 6(2) of the RTI Act and appeared to add, as a condition for judging the *bonafides* of an applicant, whether the applicant had used the information received, and if so, what was the use.

In ***HC-DEL Damodar Valley Corporation 2012***, the Delhi High Court held that though the penalty of ₹25,000 imposed by the CIC was justified, but it should be paid by the public authority rather than the PIO:

“7. No doubt, in para 20, while summing up the position, the CIC has stated that CPIO had given contradictory and misleading information and, therefore, is liable to pay the maximum penalty of Rs. 25,000/-. The Counsel for DVC on the basis thereof argues that the penalty is imposed on grounds other than for which show cause notice was given. However, perusal of paras 10 and 11 would show that the penalty was mainly imposed because of delay in furnishing the information. This penalty imposed by the CIC has been upheld by the learned Single Judge. When we find the discretionary powers exercised by the CIC are affirmed by the learned Single Judge also, we do not see any reason to interfere with such a direction, particularly having regard to the fact that the applicant is a disabled person who has been waiting for suitable consideration for the last three years. However, having regard to the facts and circumstances of the case, we are of the opinion that this penalty be not recovered from the PIO of DVC and DVC shall pay this amount. With these observations/ departure, appeal of DVC also is dismissed.” (Emphasis added)

This was despite the fact that the RTI Act, in section 20(1), provides for imposition of penalty only on the public information officer, and this also appears to be the settled legal position. The HC also did not offer any reasons why it decided to introduce a new twist to the RTI Act.

In ***HC-MAD The Registrar General Vs. R.M. Subramanian 2013***; ***HC-MAD The Registrar General, High Court of Madras Vs. K. Elango 2013***; and in ***HC-MAD The Public Information Officer Vs. The Central Information Commission 2014*** the courts have suggested new exemptions over and above those that were a part of the RTI Act, or suggested that the high courts, as public authorities, are immune from some of the provisions of the RTI Act, which are applicable to other public authorities (described in greater detail in chapter 4(e)).

Perhaps the most confusing of the High Court orders under discussion was ***HC-AP Dr. A. Sudhakar Reddy 2009***, which not only seemed to indicate that the Parliament was mistaken in legislating some sections of the RTI Act, and ignoring other sections of the statute, but also seemed to create new exemptions. As it is a brief order, it is reproduced in toto below.

“1. The petitioner is a Medical Practitioner. He filed an application dated 25-03-2008 before the Public Information Officer (Municipal Manager), Jagtial Municipality, the 3rd respondent herein, with a request to furnish certain information. Alleging that the 3rd respondent did not furnish the information within the time stipulated under the Right to Information Act, 2005 (for short 'the Act') the petitioner filed an appeal before the 2nd respondent, on 26-06-2008. He states that the 2nd respondent also did not take any action in the matter. Therefore, he filed a further appeal before the 1st respondent, under Sections 19 and 20 of the Act. This writ petition is filed with a prayer to declare the action of the respondents in not furnishing the information, sought for by the petitioner, in his representation dated 23-05-2008. Heard the learned Counsel for the petitioner.

2. The Parliament does not appear to have anticipated the level to which, the Act would be misused. A Clause contained in the Act, that an individual shall not be required to state the purpose for which the information is prayed for is required, became handy for many, who have leisure time at their disposal, to take various Government and Public Authorities for a ride. The application submitted by the petitioner on 23-05-2008 contains six paragraphs. All possible questions, in

relation to Ac.3.05 guntas of land in Sy.No.465 of Mottesivar, Ashoknagar, Jagtial, were shooed. The petitioner thought that by paying Rs. 10/-, under the Act, he can command the Municipality, at his disposal. It is not even remotely evident as to why the petitioner wanted that information, much less, that he has any grievance about the various acts and omissions, mentioned in the application.

3. For instance, he named 18 persons, in paragraph-6 of the application, and wanted the Information Officer to state, as to how many of them are in possession and enjoyment of the land in Sy. No. 465. Obviously, the respondents 2 and 3 are caught up in a tangle. If they furnish the information, according to their knowledge and assumption, it amounts to exercising powers, not conferred upon them. The reason is that it is only the Revenue Authorities under the relevant provision of law, or the Courts, that can certify or pronounce upon the possession of the individuals over the land. If they do not furnish the said information, it amounts to violation of the sacred rights, vested in the petitioner, under the Act. They have chosen a safe course, to remain silent. For all practical purposes, the petitioner treated the respondents 2 and 3, as his subordinates, if not, servants, to blindly obey, all his directions. This Court is of the view that the petitioner has resorted to gross misuse of the provisions of the Act; and no relief can be granted to him.

4. The writ petition is accordingly dismissed. There shall be no order as to costs.”

It is worth discussing whether each of these High Court orders actually added to, or amend, provisions of the RTI Act, over and above those voted on by the Parliament, and thereby exemplify the courts usurping “the legislative function under the guise of interpretation”.

Information Commissions

In an order finally struck down by the Delhi High Court, the CIC had opined that the RTI applicant was misusing the RTI Act and, as he worked for a public sector organisation, ordered that disciplinary action be taken against him and he also be made to pay costs. In **HC-DEL Praveen Kumar Jha 2011** the HC said:

“1. The Petitioner, seeking information under Right to Information Act, 2005 (‘RTI Act’) from Respondent No. 1, BHEL Educational Management Board, is aggrieved by the impugned order dated 28th July 2010 passed by the Central Information Commission (‘CIC’). While dismissing his appeal, the CIC has advised Respondent No. 1 to initiate disciplinary action against the Petitioner for misusing the provisions of the RTI Act and also consider recovery of the expenditure incurred on the travel of the Public Information Officer (‘PIO’) of Respondent No.1 for attending the bearing before the CIC.

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8. Further, while Section 20 of the RTI Act empowers the CIC to levy costs on PIOs who are found to have obstructed the furnishing of information to an applicant, there is no corresponding provision for levy of penalties or costs on a complainant if the complaint is found to be vexatious. Likewise, Section 20(2) RTI Act permits the CIC to recommend disciplinary action against an errant CPIO. There is no provision concerning the complainant. It is not possible to accept the submission of learned counsel for the Respondent that the CIC has inherent powers to issue directions, in the interests of justice, to even give an ‘advice’ on deduction of costs from the complainant’s salary or to ‘recommend’ disciplinary action against a complainant. None of the decisions cited by the learned counsel for the Respondents support his contentions. Consequently, paras 8 and 9 to the impugned order dated 28th July 2010 of the CIC are hereby set aside.

This is reminiscent of another order of the Uttarakhand Information Commission. Interestingly, in **HC-UTT Bhupendra Kumar Kukreti 2010**, the HC rightly struck down an order of the SIC directing that the state government suspend an RTI applicant. The HC held this as a misuse of section 20(2) and beyond the powers of the IC, as there was no provision in the RTI Act to penalise an applicant or appellant by recommending or directing any disciplinary action towards them!

“17. I have pondered over the matter and in my considered view, the recommendations for disciplinary action as provided under Sub-section (2) of Section 20 of the Act can only be made in appropriate case against the Public Information Officer and not against the complainant or Appellant. Nowhere under the Act, it is provided that the complainant or the

Appellant would be liable for any recommendation to face disciplinary action on the ground of any vexatious or frivolous complaint or appeal, filed by him. Be that as it may, the order of suspension dated 7-10-2009 does not anywhere indicate that any show cause notice was given to the Petitioner to explain the alleged indiscipline on his part before the Chief Information Commissioner. Although in the impugned suspension order, there is mention of charge of indiscipline, but the suspension order also does not disclose the proposed evidence to be read against the Petitioner. The Petitioner also does not appear to have been given any show cause notice before framing of charge against him or before passing order of suspension against him. The impugned order of suspension dated 7-10-2009 appears to have been passed in a mechanical manner and that too without providing any opportunity of hearing to the Petitioner before passing the order of suspension against him. The suspension order in question has been clearly passed in violation of the principles of natural justice and fair play. Needless to mention that it is always open to the departmental authorities to take disciplinary action against a government servant in appropriate cases, but it does not mean that the delinquent official can be deprived of placing his defence or to explain his conduct before any adverse order is passed against him, as has been done in the present case.

18. In view of the discussion and reasons above, since the Act does not empower the Chief Information Commissioner to make recommendation for initiating disciplinary or administrative action against the Appellant under Sub-section (2) of Section 20 of the Act, I am of the considered opinion that the order dated 25-8-2009 passed against the Appellant is not in conformity with the provisions of the Act, therefore, the same cannot be sustained. The consequential order of suspension passed by the Respondent No. 3 is solely based on the order dated 25-8-2009 passed by the Chief Information Commissioner Uttarakhand, which is also liable to be quashed. The writ petition deserves to be allowed.”

Examples of IC orders that violate or go beyond the RTI law are given in many of the chapters that follow. Specifically, in chapter 2(b), IC orders are cited that dismiss cases just because the appellant or complainant is not present for the hearing. Chapter 6 gives examples of IC orders holding that reasons cannot be sought under the RTI Act, or that applications seeking an answer to the “why” question, or in the form of “yes” or “no”, cannot be entertained, even though there is no such ban under the RTI Act. Chapter 10 describes IC orders that are unmindful of the legal provision that the applicant cannot be asked for reasons for seeking information, and chapter 12 records numerous instances of ICs allowing the imposition of costs for delayed information and, in some cases, even themselves ordering such an imposition, despite the legal waiver provided in section 7(6) of the RTI Act.

Chapter 18 discusses how provisions of section 8(1)(h) are frequently misunderstood or misapplied to exempt all information relating to matters under investigation or prosecution, rather than just that which would impede the process of investigation, apprehension and prosecution, as legally specified.

Chapter 21 describes the almost universal disinclination of ICs to even assess the applicability of the public interest override to exemptions, contained in section 8(2) of the RTI Act. A similar almost universal disinclination is witnessed in enforcing the legal requirement that exempt information be redacted from documents and the remaining information made public (chapter 22).

Chapter 23 highlights the tendency of ICs to accept third party objection to making information public as akin to a veto power, and sometimes even hold that all third-party information is by definition exempt from disclosure. Chapter 26 reveals how ICs frequently remand complaints and appeals back to PIOs or FAAs, though there is no provision in the law that permits this and much that militates against it.

Orders of ICs often seem to violate the legal dictum [sections 19(5) and 20(1)] that in considering appeals and complaints, the onus of proof is on the PIO and the denier of the information. This is discussed in chapter 27. Perhaps the most controversial of illegal orders by ICs relates to the imposition of penalties, discussed in chapter 28, where in case after case penalties are waived or ignored, despite being legally mandatory. The quantum of penalty to be imposed is also often at variance with the provisions of the law.

d) Agenda for action

- i. The courts need to continue stressing the necessity of improving the quality of judicial orders. They also need to ensure that all their judgements dealing with, or even mentioning, the poor quality and factual inadequacies of IC orders are formally brought to the notice of all ICs, especially when they are not parties to the case and as such might not feel obliged to take cognizance of them, unless formally notified.
- ii. Information commissions need to ensure that their orders are well reasoned and complete in all respects. It would be useful if the ICs adopt a uniform checklist of points they need to consider before they finalise their orders, and uniform formats for their orders. Apart from checking each item on the checklist, the ICs must ensure that, wherever applicable, reasons for every part of their order must be contained in the order. A suggested format and checklist has been given in Box 1 below.

Box 1

Suggested standard format and checklist for orders of Information Commissions

As a minimum, all orders of the Information Commissions should be speaking orders and must provide the following categories of information. **For orders relating to the imposition of penalty, please see the check list in Box 17, chapter 28. It must be kept in mind that the onus of justifying denial, delay, or any other violation of the RTI Act is on the PIO both for appeals and complaints.**

1. *Factual information*

- a) Whether an appeal, a complaint, or both
- b) Particulars of the appellant/complainant
- c) Particulars of the Public Authority
- d) Date of RTI Application, if any
- e) Date of response, if any/ otherwise record deemed refusal
- f) Date of First Appeal, if any
- g) Date of hearing of first appeal, if any
- h) Date of order of First Appellate Authority, if any
- i) Date of second appeal/complaint filed with the Information Commission
- j) Date(s) and details of notice(s) issued
- k) Date(s) of hearing(s)
- l) Particulars of those present in the hearing
- m) Date(s) of order(s) of the Information Commission
- n) Date of show-cause notice issued to PIO, if any
- o) Date of response, if any
- p) Date of hearing on show cause notice
- q) Particulars of those present in the hearing
- r) Date of penalty order (for details of penalty order, see Box 17 in chapter 28)

2. *Summary of case*

- a) Summary description of the information sought in the RTI application
- b) Summary description of response from PIO, if any
- c) Reasons given for refusal, delay, other violations, if relevant
- d) Grounds for first appeal
- e) Summary description of order of First Appellate Authority, if any, including reasons thereof
- f) Summary of issues raised in second appeal/complaint
- g) Summary of any additional material/arguments presented during hearing
- h) Summary of response to show cause notice, if received

3. *IC Decision*

- a) Decision of IC on each of the points raised in the appeal/complaint (giving reasons and basis of decision, including sections of RTI Act invoked)
- b) Legal basis and rationale for each direction of the IC including the specific section of the RTI Act invoked.
- c) Time frame within which the order/directions should be complied with and a status report filed to the Commission
- d) Specifically, verification that information was provided in the form asked for, and application was forwarded to other PA(s), if some or all of the information was held by them.
- e) Specifically, verification that if part or whole of the information was denied, that the denial passed the public interest test of 8(2), where relevant, and was such that it could be denied to Parliament/state legislature.
- f) If there was delay in providing information, directions regarding provision of information free of charge and refund of charges already collected
- g) Identification and description of any penalisable offences committed, with reasons thereof.
- h) Legal basis/grounds for imposing or not imposing penalty
- i) Quantum of penalty imposed, and reasons thereof
- j) Quantum of compensation awarded, if any, including reasons for awarding or rejecting, and for determining quantum.
- k) Whether the exempt information can be severed (S. 10) and the remaining record provided?
- l) Whether the information sought should have been proactively disclosed under S. 4?

Wherever the categories mentioned above are not relevant for a particular appeal/complaint, as it may relate to non-compliance of Section 4 etc., 'not applicable' may be recorded.

2. The right to be heard

Major Issues

The right to be heard is a most valuable right and fundamental to the judicial process and to the principles of natural justice. Unfortunately, occasionally appellate authorities like information commissions fail to honour this right. Though the record of commissions regarding the issuing of notices for hearings was reasonably good, in some cases proof that the notice actually reached the affected parties was not recorded. Even more worrying, in many cases the IC accepted, in a hearing where the appellant was not present or represented, the statement of the PIO that the asked for information had been provided to the applicant, without insisting for, and bringing on record, proof that this had happened.¹⁴

The rules under the RTI Act, formulated by the Central Government, along with those formulated by many of the state governments and other competent authorities, provide certain flexibility that is not commonly available in other laws (section 12 of the *Right to Information Rules, 2010*). For one, though it is mandatory to give advance notice to the complainant or appellant about a proposed hearing, they have the option not to be present. Second, they permit an appellant or complainant to be represented by any authorised person and not just a legal practitioner. Most important, the RTI Act puts the onus of proof in all appeals and complaints on the PIO to prove that he/she acted in accordance with the law, in a sense reversing the usual practice of a person being innocent till proven guilty, to a person being guilty unless proven innocent (see chapter 27 for detailed discussion). This, effectively, puts the responsibility of arguing the appellant's or complainant's case on the information commission, as the commission has to assume that their case is correct and the PIO has to establish that it is not.

a) Hearing affected parties in appeals and complaints

Judicial orders have by and large upheld the criticality of giving all concerned parties an opportunity to be heard. In ***SC Manohar 2012*** the Supreme Court held that information commissions must respect and follow the principles of natural justice and ensure that the PIO is given an opportunity to be heard not only when the imposition of penalty is being considered but also when it is proposed to recommend disciplinary action. The SC was approached by a PIO against whom the SIC had directed the government to take disciplinary action as he had, according to the SIC, not responded to an RTI application in time. The appeal by the PIO to the HC, against this order of the SIC, was dismissed by the HC.

The SC upheld the appeal and exonerated the PIO, striking down the HC order upholding the order of the SIC, on various grounds, one being that the principles of natural justice were violated as the appellant (in this case the PIO) was not given a reasonable opportunity of being heard and of putting his case forward¹⁵.

In ***HC-TRI Dayashis Chakma 2015***, the Tripura High Court reverted a matter back to the SIC for fresh consideration because the SIC had not given an opportunity to all the affected parties to be heard, not just on the merits of the case, but even on whether the delay in submission should be condoned or not¹⁶.

Similarly, the Delhi High Court struck down an order of the CIC, in ***HC-DEL Northern Zone Railway Employees Co-Operative Thrift and Credit Society 2012***, because the petitioner, who was arguing that it is not a public authority, was not given an opportunity of being heard.

¹⁴ In nearly 70% of the cases in the sample of cases of the Bihar State Information Commission, the PIO reported that the information asked for had been provided prior to the hearing. However, only in 15% of these was the appellant either present or had confirmed in writing that the information had been received.

¹⁵ Extracts from the SC order reproduced in annexure 7(b).

¹⁶ Extracts from the order in annexure 7(b).

“4. The first submission of learned counsel for the petitioner is that the CIC should not have ruled on the status of the petitioner as being a "public authority", when the case of the petitioner was that it was not a "public authority" within the meaning of Section 2(h) of the RTI Act, without notice to, and granting hearing to the petitioner. I fully agree with this submission of the learned counsel for the petitioner, as an order, which has a bearing on the status, rights and obligations of a party qua the RTI Act, could not have been passed without even complying with the basic principles of natural justice, which are embedded and engrained in the RTI Act. On this short ground, the conclusion drawn by the learned CIC that the petitioner is a "public authority" within the meaning of Section 2(h) of the RTI Act cannot be sustained, and is liable to be set aside.”

Also, in ***HC-P&H Ved Parkash 2012***, the Punjab and Haryana High Court held that if the affected parties were not given notice and thereby deprived of the opportunity to be heard, then that was enough ground to set aside an order passed by any authority.

“12. The grievance raised by learned counsel for the petitioners in the present case is also that before deciding the appeal, the petitioners were not given any opportunity of hearing by the Commission. It cannot be disputed that no one can be condemned unheard. In case, the petitioners had filed appeal, minimum that was required was intimation of date of hearing to them so as to enable them to appear before the Commission and present their case. Reference can be made to Sayeedur Rehman v. State of Bihar, MANU/SC/0053/1972 : (1973) 3 S.C.C. 333; Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 S.C.C. 248; Mobinder Singh Gill v. Chief Election Commissioner, MANU/SC/0209/1977 : (1978) 1 S.C.C. 405; Swadeshi Cotton Mills v. Union of India, MANU/SC/0048/1981 : (1981) 1 S.C.C. 664; Special Leave Petition (Civil) No. 23781 of 2007 Indu Bhusan Dwivedi v. State Jharkhand and another, decided on 5.7.2010. The same having not been done, it has resulted in prejudice to the petitioners. This ground alone is also sufficient to set aside an order passed by any authority.

“13. A similar issue came up for consideration before this court in C.W.P. No. 17157 of 2010 W's Mahindra and Mahindra Ltd. v. The Employees Provident Fund Appellate Tribunal and another, decided on 24.7.2012, where the Employees Provident Fund Appellate Tribunal, which has its principal seat at New Delhi, heard some cases by holding Camp Court at Chandigarh. However, proper intimation about the date of hearing was not given to the party concerned. The order was set aside and the matter was remitted back.

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*“15. It is expected that the Commission shall bring the order passed in this case to the notice of all concerned for compliance.
16. Copy of the order be also sent to the Chief Information Commissioner, New Delhi and State Information Commission, Punjab for bringing it to the notice of all the authorities dealing with the cases under the Act.
17. Copy of the order be also sent to Chief Secretary, Punjab and Haryana and Home Secretary, Union Territory, Chandigarh for information and compliance. The petition stands disposed of.”*

Though a statistical analysis of nearly 2000 cases of appeals and complaints adjudicated by the CIC and the Assam, Bihar and Rajasthan ICs showed that in most cases the ICs did give an opportunity to all relevant parties to be heard at least at the stage of the original hearing of the appeal or complaint, nevertheless, in a few cases this did not happen. For example, in a series of cases the deputy/assistant registrar of the CIC replied to the appellant stating that the body from which information was sought was not a public authority. It appears that these ‘directions’ were passed without the appellant being given an opportunity of being heard and further, in at least one of the three cases, it was not mentioned that the communication had the approval of or was on the direction of the commissioner. Holding a hearing in the matter would have provided the appellant an opportunity to present evidence why they believed that the body concerned was a public authority, especially as the eligibility of a body to be so considered is itself subject to interpretation, and would have also given an opportunity to the Commissioner to probe if any of the provisions under Section 2(h) were applicable to the body at hand. (***CIC/001048 dated 30.11.2010, CIC/000697 dated 27.05.2016, CIC/000209 dated 01.06.20116***)

b) Dismissing cases because appellant or complainant is absent

From the fact that appellants and complainant have a right to be heard, it cannot be deduced that if they do not exercise this right then they lose the right to get justice. There are a sizable number of IC orders that draw adverse conclusions from the absence of appellants and complainants, even going to the extent of sometimes closing matters because the appellants or complainants have not turned up for the hearing. In fact, in some proceedings, from the absence of the appellants or complainants, the IC inferred that they were no longer interested in following up or that they had received the required information. The appeal or complaint was therefore dismissed.

It often happens that people receive the notice of the IC hearing after the date of the hearing has passed and therefore miss the hearing for no fault of theirs. In addition, given the long time it takes between the filing of an appeal or complaint and the hearing of the case, often people lose track of the application or lose hope. The RaaG study in 2014¹⁷ found delays of over a year common, and the situation has not improved in 2016 (for details see chapter 5(f)).

Besides, many of the appellants are poor and live in towns and villages far from the location of the IC office, often in different states and sometimes even in different countries. They might not always have the time to travel to the IC for the hearing, nor the resources to hire a lawyer or appear themselves. Though many ICs have now set up video conferencing facilities, many appellants, especially those living in rural areas or small towns, do not have a corresponding facility available.

In any case, using the absence of the appellant or complainant as a justification for the dismissal of proceedings, is a violation of the RTI Act, as the presence of the appellant or complainant during the hearings is not mandated under the law. In fact, the Central Government RTI rules (section 12) specify that the “*appellant may be present in person or through his duly authorised representative or through video conferencing, if the facility of video conferencing is available, at the time of hearing of the appeal by the Commission*”. This clearly gives the option to the appellant who “may” be present but does not “have to be” present. Similar clauses exist in RTI rules of various states and competent authorities. However, as mentioned earlier, in the absence of a specific provision to the effect in the RTI Act, the absence of an appellant cannot be considered a basis for closing the matter.

If the appellant is absent, the IC should give its order on merit after examining the available facts. Should there be any detail that is not available, the IC must record that fact and provide a reasonable timeframe for the appellant to respond, rather than dismissing the case. Besides, sections 19(5) and 20(1) place the onus of justifying their decisions wholly on the PIOs, and therefore the IC must presume that the asked for information should be disclosed and that the delays and denials, among others, must be penalised. The onus is on the PIO to give convincing proof to the contrary.

Despite the legal position, many ICs continue to consider the absence of an appellant as a legitimate ground for closing the matter. In a case in Bihar, the IC closed the case noting that, “*Appellant is absent for a second time. Assuming appellant would have received information in the interim, matter is closed.*” Translated from Hindi (**SIC/BIH/83983 dated 20.01.2014**).

The CIC dismissed an appeal against the NTPC stating that, “*In the light of the submissions made by the public authority and the fact that the appellant chose not to appear for the hearing, we are of the view that no intervention of the Commission is required.*” (**CIC/001287 dated 07.02.2014**).

In an order dated 08.03.2013, an appeal hearing was rescheduled, as the appellant was absent from the hearing. And in the final order dated 24.04.2013, the Bihar IC disposed the matter by stating that as the appellant had been absent for two hearings and had therefore not shown any interest in following up on the

¹⁷ RaaG and CES, 2014. Op cit

matter, the case is closed (*SIC/BIH/85456 dated 20.12.2012, with additional hearings on 08.03.2013 and 24.04.2013*).

c) Hearing appellants and complainants in penalty proceedings

There is no specific provision in the RTI Act which either establishes or disallows the right of the appellant or complainant to be a party, be heard, or be present, in proceedings relating to the imposition of a penalty under section 20(1) of the RTI Act. The RTI Act seems silent on this matter.

Initially this did not appear to be an issue, but some complainants and appellants began to complain that they were neither being kept informed nor being invited by the IC for the hearings related to the penalty proceedings. Finally, in 2012, the matter came before the Delhi High court which ruled, in *HC-DEL Ankur Mutreja 2012*, that the appellant or complainant had no legal claim to be heard in the penalty proceedings, but there was no bar either, and left it to the discretion of the IC¹⁸.

This was followed up by *HC-DEL Maniram Sharma 2015*, wherein the Delhi HC reiterated the position taken by the court in *HC-DEL Ankur Mutreja 2012*, but added that there are instances like the one before the court where the presence and participation of the appellant or complainant can bring out important facts relevant to the matter¹⁹.

Without getting into the finer intricacies of jurisprudence, there are at least three reasons why it would serve the ends of justice if an appellant or complainant, considering the law does not debar them, is invited to participate in penalty hearings.

BOX 2

In *HC-DEL Harish Kumar 2012* the PIO cites as a defence that he had requested the appellant to send him the contact address of the third party and that the appellant had not responded. This defence seems to have been accepted, though if the appellant was present he might have been able to clarify that he had received no such request and that, in any case, under the RTI Act he was not obliged or even expected to provide the third party's address.

First, as already highlighted in *HC-DEL Maniram Sharma 2015*, the appellant or complainant can often provide information that is useful for a proper decision in the penalty proceedings (one example in Box 2). Specifically, there are three acceptable defences for the PIO prescribed in the RTI Act against the imposition of penalty:

1. Reasonable cause for refusing to receive an application or for delay in furnishing information
2. Lack of mala fide for denying a request for information
3. Unknowingly giving incorrect, incomplete or misleading information; or destroying information; or obstructing the furnishing of information

What would have been determined in the main hearing, in the presence of all parties, was whether there was refusal, delay, denial, or the giving of incorrect, incomplete, or misleading information, or destruction or obstruction. But whether these were on the basis of reasonable cause, without mala fide, and unknowingly, would only be determined in the penalty hearing.

For each of these three, the evidence of the appellant or the complainant could be relevant, even crucial. For example, if the PIO claims that she had personally, or telephonically, requested the appellant or complainant to pick up the documents, which they had agreed to do but then not turned up, leading to a delay in their being despatched, this would require the input of the appellant or complainant before a final decision could be made, especially in light of a qualification in section 20(1), which reads:

“Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.”

¹⁸ Extracts from the order in annexure 7(b).

¹⁹ Extracts from the order in annexure 7(b).

It could be argued that this issue should have been resolved during the main hearing on the appeal or complaint, in the presence of the appellant or complainant, and not brought up in the penalty hearing. But there is nothing in the RTI Act that requires this, and the main thrust of the general hearing might have been other issues rather than the delay in submission. Besides, as the PIO would know that the appellant or complainant would not be a party to the penalty hearings, it would be in the interest of the PIO to bring up this defence only in the penalty hearings.

Similarly, the plea against mala fide might require the inputs of the appellant or complainant who might be able to demonstrate how the asked for information might have incriminated the PIO or his friends and relatives, or how the PIO had antipathy towards the applicant which was behind the refusal. The applicant could also provide relevant arguments and facts on a PIO's defence that the violations were unknowingly committed.

It might also be argued that there is nothing to prevent the IC from inviting the applicant or appellant to a subsequent penalty hearing if it emerged at the initial hearing that there were pleadings made that might benefit from the inputs of the appellant or complainant. Though true, this would mean enormous delays and a waste of the commission's time, which would have to have at least two hearings instead of one. Given the current back-logs, and the eagerness of most appellants and complainants to be a part of penalty hearings, it would be far better if they were invariably invited, with the option to decline the invite.

Second, if the applicant or appellant is denied locus standi in the penalty proceedings, then once the main hearing is over, there is no protagonist to the proceedings. Clearly it is not in the interest of the PIO to pursue the proceedings, and the public authority is not involved. Arguably, the IC, which has issued the required show cause notice to the PIO ought to pursue the matter. As things stand, this is not happening. As has been discussed in chapter 5(g) of the report dealing with orders of information commissioners, in a large proportion of the cases where a show cause notice was issued, there is little follow up.

Thirdly, though it is correct that the penalty paid by the PIO does not, in part or full, come to the appellant or complainant and, therefore, they have no direct financial stake in the proceedings, most people who file appeals and complaints are seeking justice. An important part of getting justice is to ensure that the persons who violated the law get their just deserts. Therefore, if justice is not only to be done but also appear to be done, then appellants and complainants must be allowed to participate in penalty hearings, or at the very least be authorised and invited to be observers.

The parallel drawn by the Delhi HC (*HC-DEL Ankur Mutreja 2012* Para 11) between penalty proceedings and contempt of court proceedings seems inappropriate, as in contempt proceedings the court, in a sense, is the wronged (or "contempted" against) party whose powers and standing are at stake. However, in penalty hearings the only wronged party is the appellant or complainant, and through her the people of India who struggle to exercise their fundamental right to information.

There are also examples where high courts have without comment accepted appellants and complainants to be a party to penalty proceedings. For example, in *HC-DEL UoI vs Praveen Gupta 2014* the Delhi High Court not only allowed Praveen Gupta, the appellant, to be the respondent in a case related to penalty proceedings, but even allowed a pass over in the hope that the appellant or his representative might appear.

Present writ petition has been filed challenging the order dated 13th October, 2011 passed by the Central Information Commission (for short ?CIC?) (sic) whereby penalty of Rs. 25,000/- has been levied on the PIO for not supplying the information within the prescribed time. Since despite a pass over none has appeared for the respondent, this Court has no other option but to proceed ahead with the matter.

Interestingly, the Delhi High Court seems to be under the impression that the penalty imposed by the CIC is payable to the appellant, who is the respondent in this case.

“The CIC has imposed penalty on the PIO on the ground that the information had been supplied after lapse of hundred days instead of prescribed period of thirty days. However, keeping in view the width and amplitude of the queries sought for by the respondent, this Court is of the view that same could not have been reasonably disclosed within a period of thirty days.

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“Consequently, the impugned order dated 13th October, 2011 imposing penalty on the PIO is set aside. The amount of penalty, if any, paid to respondent shall be refunded to the petitioner. Accordingly, present petition and application stand disposed of.” (Emphasis added).

Perhaps if the respondent (the information seeker) had been present, he could have pointed out to the court that there is no provision in the RTI Act that allows the appellant or complainant to receive part or whole of the penalty imposed.

d) Agenda for action

- i. Clearly information commissions must recognise the right of every affected party to be heard, and must ensure that notices of hearings are received by these parties well in time. But ICs must also recognise that the law does not insist on the presence of the appellant, who might be prevented from being present due to late receipt or non-receipt of the notice, long distance to the IC offices, non-accessibility to video conferencing facilities, and economic hardship.
- ii. In any case, the commissions need to recognize that in all appeal and complaint hearings the onus is on the PIO to justify denial of information or violation of any provision of the law. The ICs must, therefore, operate with the assumption that the appellant’s contentions in the appeal or complaint are valid and leave it to the PIO to establish otherwise.
- iii. Those few information commissions who have decided not to allow complainants and appellants to be a party to the penalty proceedings must reconsider their stand.
- iv. ICs must also ensure that claims by PIOs that the asked for information has been supplied, or other such, must not be accepted without documentary proof of delivery.

3. Misuse of the RTI Act

Major Issues

Almost from the start, soon after the RTI Act was enacted in 2005, allegations were made about its misuse. Apart from alleging that the RTI Act primarily served public servants, seeking information about service matters, or rich urban dwellers, it was also alleged that a large proportion of frivolous or vexatious applications were being filed, that government departments were being overwhelmed by RTI applications, and that the system was being overtaxed by applications seeking very voluminous responses.

a) Primarily being used by public servants and the urban elite

The initial charge was that the act was primarily being used by public servants to seek information about their service matters, and was hardly of any use to the people of India, especially the poor and rural populations. For example, in a widely-reported order of the Central Information Commission, the commission held:

“5. The information seeker, being an employee of the respondent, is a part of the information provider. Under the RTI, the employees are not expected to question the decisions of the superior officers in the garb of seeking information. Such employees have access to internal mechanisms for redressal of their grievances. Unfortunately, a large number of the government employees are seeking information for promotion of their personal interest. This is done on the pretext of serving the public cause, without realizing the extent of distortions that it causes in use of public resources due to putting up frivolous applications by them for self-interest. This appeal is in no way exception.” (CIC/00373 dated 14.06.2007)

Fortunately, various studies debunked these rumours. These studies also statistically established that very few public servants were filing applications about their service matters and that a large number of RTI applications emanated from poor urban families and from rural areas, seeking information about their basic entitlements in their bid to secure justice.

The 2014 RaaG study²⁰ found that 14% of the applicants lived in rural areas, 58% in towns or cities, and 29% in metropolitan centres. If an estimated 40 lakh (4 million) RTI applications were filed in India, in 2011-12, then this would suggest that over five lakh of the applicants were from rural areas. More than half the urban applicants and all of the rural applicants from among those randomly interviewed for the assessment, were living below the poverty line (BPL).

Only 5% of the RTI applications were from public servants seeking information about their service matters.

b) Allegations of vexatious and frivolous applications

Soon after a new attack started, claiming that many RTI applications were vexatious and frivolous. The Second Administrative Reforms Commission, in its June 2006 report *Right to Information: Master Key to Good Governance*, took this charge at face value and recommended that the RTI Act be amended to disqualify frivolous and vexatious applications, whatever they might be²¹.

Even the then Prime Minister had stated not once but twice, in his annual speeches at the conference of information commissioners, that the RTI Act was being widely misused. The Prime Minister had also alleged that the government was being overwhelmed by RTI applications. Addressing the annual CIC convention in 2011, the then PM had said²² “A situation in which a public authority is flooded with requests for

²⁰ P 46, p 49 table 5.2, chapter 5, RaaG & CES, 2014, *Op. cit.*

²¹ Page 47, 48. Accessible at http://darpg.gov.in/sites/default/files/rti_masterkey1.pdf

²² <http://cic.gov.in/convention-2011/Speeches/PMspeech.pdf>

information having no bearing on public interest is something not desirable". In 2012, addressing the convention again, the PM stated that requests for voluminous information or those seeking information for a long period of time were *"diverting precious man-hours that could be put to better use"*.

It was only after the PMO acknowledged, twice, in response to RTI applications, that it had no actual evidence of misuse²³, and two national studies done by RaaG (2008 and 2014) gave statistical proof that there were negligible numbers of "vexatious and frivolous applications" (less than 1% of the RTI applications analysed could be termed frivolous or vexatious), that the hullabaloo died down a bit. Studies done by RaaG²⁴ showed that 67% of RTI applications filed were seeking information that should either have already been made public pro-actively, under section 4 of the RTI Act without being requested for (49%), or proactively supplied to the applicant without her having to file an RTI application (18%).

It was mainly because the government was not fulfilling its statutory obligations under section 4 of the RTI Act that lakhs of people in India had to spend time, energy, and money to get vital information about their basic entitlements

More recently, there were attacks in Parliament on the right to information. MPs from various political parties alleged that the RTI Act was being misused and that it was being used by tea vendors and labourers to seek information about the space programme. Of course, the MPs involved did not explain how this was a misuse.

c) Allegations of overtaxing the system

The Supreme Court, in **SC CBSE 2011**, towards the end of its lengthy order, and without citing any facts or evidence, stated:

"37...Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties."

These fears were not borne out by the 2014 report of RaaG²⁵ which, based on the sample of PIOs interviewed across the country, found that on an average a PIO received 17 RTI applications a month in 2012-13. 38% of the PIOs spent less than 2 hours a week on RTI related work, while 39% spent less than 5 hours a week. These findings were neither challenged by the government, nor contradicted by any other study.

It would be unrealistic to argue that any law, including the RTI Act, is never misused. The only thing that can reasonably be claimed is that, based on the statistics cited earlier, the misuse of the RTI Act seems to be minimal and perhaps less than the misuse of many other laws with a far greater potential to be oppressive. Despite this, the constant clamour about its misuse makes one wonder whether it is because the

<http://cic.gov.in/Convention-2012/Speeches/PMspeech.pdf>

²³ In May 2011: <http://www.governancenow.com/news/regular-story/frivolous-rti-pleas-frivolous-argument> & December 2012: <http://timesofindia.indiatimes.com/india/No-records-to-back-Manmohans-RTI-concerns-PMO/articleshow/17457804.cms>

²⁴ P 51, chapter 5, RaaG and CES, 2014, *Op. cit.*

²⁵ P 93, chapter 8, RaaG & CES, 2014, *Op. cit.*

RTI Act is one of the very few laws that empowers the people to take the government to task. Most or all other laws empower governments to regulate and prosecute the public.

Fortunately, the Supreme Court came forcefully to the defence of the RTI user in **SC ICAI 2011**, and held that public authorities should realise that the era of transparency is here:

“ 25.We do not agree that first respondent had indulged in improper use of RTI Act. His application is intended to bring about transparency and accountability in the functioning of ICAI. How far he is entitled to the information is a different issue. Examining bodies like ICAI should change their old mindsets and tune them to the new regime of disclosure of maximum information. Public authorities should realize that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. Parliament has enacted the RTI Act providing access to information, after great debate and deliberations by the Civil Society and the Parliament. In its wisdom, the Parliament has chosen to exempt only certain categories of information from disclosure and certain organizations from the applicability of the Act. As the examining bodies have not been exempted, and as the examination processes of examining bodies have not been exempted, the examining bodies will have to gear themselves to comply with the provisions of the RTI Act. Additional workload is not a defence. If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the government for consideration so that any changes to the Act can be deliberated upon. Be that as it may.”

In **SC RBI 2015**, the SC stressed the value of the RTI, especially by quoting Parliamentary debates around the RTI bill. The SC further held that the overuse of exemptions by PIOs just heightens suspicion in the mind of the public and that regulatory authorities should promote public accountability.

“48. While introducing the Right to Information Bill, 2004 a serious debate and discussion took place. The then Prime Minister while addressing the House informed that the RTI Bill is to provide for setting out practical regime of right to information for people, to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority. The new legislation would radically alter the ethos and culture of secrecy through ready sharing of information by the State and its agencies with the people. An era of transparency and accountability in governance is on the anvil. Information, and more appropriately access to information would empower and enable people not only to make informed choices but also participate effectively in decision making processes. Tracing the origin of the idea of the then Prime Minister who had stated, "Modern societies are information societies. Citizens tend to get interested in all fields of life and demand information that is as comprehensive, accurate and fair as possible." In the Bill, reference has also been made to the decision of the Supreme Court to the effect that Right to Information has been held as inherent in Article 19 of our Constitution, thereby, elevating it to a fundamental right of the citizen. The Bill, which sought to create an effective mechanism for easy exercise of this Right, was held to have been properly titled as "Right to Information Act". The Bill further states that a citizen has to merely make a request to the concerned Public Information Officer specifying the particulars of the information sought by him. He is not required to give any reason for seeking information, or any other personal details except those necessary for contacting him. Further, the Bill states:

“The categories of information exempted from disclosure are a bare minimum and are contained in Clause 8 of the Bill. Even these exemptions are not absolute and access can be allowed to them in public interest if disclosure of the information outweighs the harm to the public authorities. Such disclosure has been permitted even if it is in conflict with the provisions of the Official Secrets Act, 1923. Moreover, barring two categories that relate to information disclosure-which may affect sovereignty and integrity of India etc., or information relating to Cabinet papers etc.-all other categories of exempted information would be disclosed after twenty years.

There is another aspect about which information is to be made public. We had a lengthy discussion and it is correctly provided in the amendment Under Clause 8 of the Bill. The following information shall be exempted from disclosure which would prejudicially affect the sovereignty and integrity of India; which has been expressly forbidden; which may result in a breach of privileges of Parliament or the Legislature; and also information pertaining to defence matters.

They are listed in Clause 8 (a) to (g). There are exceptions to this clause. Where it is considered necessary that the information will be divulged in the interest of the State, that will be done. There must be transparency in public life. There must be transparency in administration and people must have a right to know what has actually transpired in the secretariat of the State as well as the Union Ministry. A citizen will have a right because it will be safe to prevent corruption. Many things are done behind the curtain. Many shoddy deals take place in the secretariats of the Central and State Governments and the information will always be kept hidden. Such practice should not be allowed in a democratic country like ours. Ours is a republic. The citizenry should have a right to know what transpired in the secretariat. Even Cabinet papers, after a decision has been taken, must be divulged as per the provisions of this amendment. It cannot be hidden from the knowledge of others.”

“49. Addressing the House, it was pointed out by the then Prime Minister that in our country, Government expenditure both at the Central and at the level of the States and local bodies, account for nearly 33% of our Gross National Product. At the same time, the socio-economic imperatives require our Government to intervene extensively in economic and social affairs. Therefore, the efficiency and effectiveness of the government processes are critical variables, which will determine how our Government functions and to what extent it is able to discharge the responsibilities entrusted. It was pointed out that there are widespread complaints in our country about wastefulness of expenditure, about corruption, and matter which have relations with the functioning of the Government. Therefore, it was very important to explore new effective mechanism to ensure that the Government will purposefully and effectively discharge the responsibilities entrusted to it.”

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“64... it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions given Under Section 8 of RTI Act, have evaded the general public from getting their hands on the rightful information that they are entitled to.

“65. And in this case the RBI and the Banks have sidestepped the General public's demand to give the requisite information on the pretext of "Fiduciary relationship" and "Economic Interest". This attitude of the RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the Banks accountable to their actions.”

The Rajasthan High Court also expressed similar sentiments in ***HC- RAJ RPSC 2012:***

“17. Before parting with the order, this Court would like to record and also observed by Apex Court that the time has come when the public authority has to change their mind sets in regard to maintaining transparency and accountability which is the basic tenet and prime object with which RTI Act has been enacted, to fight against corruption and bring transparency in obligation of discharge of duties of public authorities whose legal obligation is to disclose information as desired by the person and who is not supposed to disclose his locus or interest, unless exempted under the RTI Act. However, this Court can take judicial notice that even after the RTI Act having come into force since 21/06/2005; but still public authorities are not prepared in providing/ disclosing information which a person/citizen has a right to claim under RTI Act and orders of the Information Officer and appellate authority are consistently coming up being assailed by public authorities.”

It is important for the courts and the government to be conscious of the reality, as has emerged through various scientific studies, that in actual fact the RTI Act is helping a large number of people, many of them from among the poor and marginalised sections of society, to access their basic entitlements. This is especially so in the critical absence of effective grievance redress laws that could address the various service delivery issues that the people of India face, and which finally get transformed into RTI applications.

The RaaG assessment recorded²⁶ that 80% of respondents in rural FGDs, and 95% in urban FGDs, said that they wanted to use the RTI Act to seek redress of their grievances. Analysis of RTI applications

²⁶ P 2, RaaG & CES, 2014, *Op. cit.*

showed that at least 16% of the applicants were seeking information that was aimed at getting action on a complaint, getting a response from a public authority, or getting redress for a grievance.

Also, the widespread non-compliance, by the government, of legal requirements in the RTI Act and in other laws, for proactive disclosure of information to the people, and informing people of the decisions that affect them, has resulted in people having no choice but to file RTI applications as a last resort. In fact, the recent RaaG study²⁷ shows that a very large proportion of the RTI applications which are held to be examples of misuse as they ask for voluminous information, are actually seeking information that should have been proactively made accessible, but was not.

Despite the evidence, governments have repeatedly propagated the misuse “myth”. A case in point being the recent tweet by a central government minister about an RTI application asking the government about its plans to counter an invasion by zombies and aliens. The publicity given by the minister’s tweet ensured that this one, somewhat funny, RTI application was widely covered in leading newspapers²⁸ and provided further fuel to the detractors of RTI. But consider that over 40 lakh (4 million) applications are filed every year, and yet the one case of “misuse” gets talked about while the remaining thirty nine lakh, ninety-nine thousand nine hundred and ninety-nine genuine cases pass by unnoticed.

Information commissions sometimes add to the hullabaloo regarding misuse, basing their criticism on the appeals and complaints that come up to them. Often commissioners do not realise that only about 5% (see chapter 5(d) for details) of the RTI applications escalate to the commission in the form of second appeals or complaints. These are predominantly from the better off and educated segments of society, who have the wherewithal, the time and the ability to approach the commission. Therefore, even if a quarter of all cases dealt with by ICs seem frivolous, this would be less than 2% of the total applications.

d) Agenda for action

- i. The judiciary should discuss and themselves decide to refrain from making casual adverse observations on the use of the Right to Information Act, which are not of direct relevance to the matter being adjudicated, and are not based on concrete evidence. Such comments from members of the judiciary, who are much respected and revered, have widespread unintended impacts of emboldening public authorities to illegitimately deny information, while demoralising the public.
- ii. The adjudicators should keep in mind the power of the dramatic anecdote, where even a single RTI application that seeks either voluminous or seemingly meaningless or useless information, is discussed widely and soon gets a weightage that quite ignores the fact that there were hundreds of thousands of other RTI applications seeking critical information about basic entitlements.

²⁷ P51, chapter 5, RaaG & CES, 2014, *Op. cit.*

²⁸ See, for example, <http://www.hindustantimes.com/india-news/can-india-survive-a-zombie-invasion-asks-rti-inquiry/story-Fqblw7kCv5TrZAAw1sZIN.html>

4. Judiciary and the RTI

Major Issues

Each state and the Centre have autonomous and independent information commissions with the exclusive mandate of adjudicating on complaints and appeals under the RTI Act. However, there are an increasing number of cases being filed in various high courts and in the Supreme Court, on matters related to or arising from the RTI Act.

In actual fact, the RTI Act does not permit any appeals to be entertained by any court. Section 23 bars the jurisdiction of courts over matters relating to any order made under the Act. It says:

“No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act.”

Nevertheless, the Indian Constitution gives powers to the Supreme Court and the high courts, that override any statute, though certain limitations have been placed on high courts by the Constitution and further enunciated by the Supreme Court.

But, apart from having the jurisdiction to hear cases related to the RTI Act, the Supreme Court and the High Courts are themselves public authorities, and the Chief Justices are competent authorities under the Act. Therefore, another important issue that emerges is how the courts interpret their powers and obligations as public authorities and competent authorities.

There is also the question: does the fact that the High Court is a “Constitutional body” imply that all its dictums, especially those manifested through the rules formulated by it, have constitutional status and are outside the jurisdiction of section 22 of the RTI Act, even if they are inconsistent with the RTI Act. Similarly, are all the statutory obligations that other PAs have under the RTI Act, also binding on the courts.

To get clarity on the legal and constitutional issues involved in determining the answer to these questions, an informed public debate of concerned citizens and legal professionals needs to be provoked.

a) Jurisdiction of higher courts under the Constitution

Given the fact that the right to information has been adjudged by the Supreme Court to be a fundamental right²⁹, Article 32 of the Constitution becomes applicable to the right to information:

“32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”

Article 136(1) of the Constitution says:

“Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India”.

Members of the public can also move the Supreme Court by filing a public interest litigation (PIL). This has been described on the Supreme Court website³⁰ as follows:

²⁹ *SC The State of Uttar Pradesh 1975*

³⁰ <http://supremecourtsofindia.nic.in/jurisdiction.htm>

“Although the proceedings in the Supreme Court arise out of the judgments or orders made by the Subordinate Courts including the High Courts, but of late the Supreme Court has started entertaining matters in which interest of the public at large is involved and the Court can be moved by any individual or group of persons either by filing a Writ Petition at the Filing Counter of the Court or by addressing a letter to Hon'ble the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. Such concept is popularly known as 'Public Interest Litigation' and several matters of public importance have become landmark cases. This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction. A Writ Petition filed at the Filing Counter is dealt with like any other Writ Petition and processed as such. In case of a letter addressed to Hon'ble the Chief Justice of India the same is dealt with in accordance with the guidelines framed for the purpose.”

Similarly, articles 226 and 227 of the Constitution gives powers to High Courts to issue directions, orders and writs to any person or authority in its jurisdiction.

“226. (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

227. (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.”

Though these articles seem, to a layperson, to provide full power to the Supreme Court and the high courts to issue orders on all matters, there is debate on what limits, if any, should be exercised by the high courts and what matters are appropriate, perhaps judicially correct, for high courts to adjudicate upon as a part of their writ jurisdiction.

There are at least two Supreme Court orders that substantially limit the powers of the high courts under article 226 of the Constitution. Both of them categorically hold that the powers of the high court are supervisory and not appellate. In ***SC Sub-Divisional Officer, Konch 2000***, the Supreme Court holds that the high court cannot examine the evidence and re-appreciate it while exercising its powers under Article 226:

“3...The learned Counsel appearing for the appellant contended that within the parameters prescribed for exercise of discretionary supervisory jurisdiction under Article 226 of the Constitution, it was not open for the High Court to examine the evidence adduced before the enquiring authority and on re-appreciation of the same disturb the findings arrived at. The learned Counsel for the respondent, on the other hand, contended that since appropriate authority never even took into consideration the reply filed by the delinquent, the High Court was fully justified in interfering with the order of punishment inflicted upon by the disciplinary authority, which was affirmed by the U.P. Public Service Tribunal.

4. In view of the submissions made at the Bar, we have scrutinised the impugned order of the High Court. A bare perusal of the same makes it crystal clear that the High Court in exercise of its jurisdiction under Article 226 has re-appreciated the entire evidence, gone into the question of burden of proof and onus of proof and ultimately did not agree with the conclusion arrived at by the enquiring officer, which conclusion was upheld by the disciplinary authority as well as the U.P. Public Service Tribunal. It has been stated by this Court on a number of occasions that the jurisdiction of the High Court under Article 226 is a supervisory one and not appellate one, and as such the Court would not be justified in re-appreciating the evidence adduced in a disciplinary proceeding to alter the findings of the enquiring authority. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction under Article 226 in interfering with the findings arrived at by the enquiring authority by re-appreciation of the evidence adduced before the said enquiring authority. We, therefore, set aside the impugned order of the High Court and the Writ Petition filed stands dismissed. This appeal is allowed.”

A similar point is made by the Supreme Court in **SC Sadhana Lodh 2003**, except that here it is specific to jurisdiction under Article 227.

“6. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or re-weigh the evidence upon which the inferior court or Tribunal purports to have passed the order or to correct errors of law in the decision.”

High courts have also taken a similar view. The Punjab and Haryana High Court, in **HC-P&H The Hindu Urban Cooperative Bank Ltd. 2011**, suggests that writ jurisdiction is restricted to those orders that are perverse and without jurisdiction.

“86. There is another aspect of the matter, which can be viewed from a different angle. As is evident that the SIC have scrutinized the material on records in the right perspective and recorded the finding of facts based on material on records that the petitioner-institutions are controlled and have been substantially financed by the funds provided directly or indirectly by the State Governments and are liable to impart the informations to the complainants. Meaning thereby, the SIC have recorded the valid reasons in the impugned orders. Such orders containing the valid reasons cannot legally be set aside in exercise of the writ jurisdiction of this Court, unless the same are perverse and without jurisdiction. As no such patent illegality or legal infirmity has been pointed out by the Learned Counsel for the petitioner-institutions, therefore, the impugned orders are hereby maintained in the obtaining circumstances of the case.”

Similarly, the Delhi High Court, in **HC-DEL Dr. Neelam Bhalla 2014**, holds that unless the conscience of the court is shocked, there is no scope for interference:

“5...In any event, in the opinion of this Court it is normally not open in writ jurisdiction to tamper or vary the punishment that has been awarded by the CIC. In *V. Ramana vs. A.P. SRTC and Others*, MANU/SC/0539/2005 : (2005) 7 SCC 338, the Supreme Court has held that, "To put it differently unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/Tribunal, there is no scope for interference." Consequently, in the present case as the punishment imposed does not shock the conscience of this Court, the present writ petition is dismissed.

In another case, the Punjab and Haryana High Court reiterates that unless an order of the commission is perverse and without jurisdiction, it cannot be set aside on the basis of a “limited writ jurisdiction”.

“11. Meaning thereby, the SIC has recorded valid reasons in this relevant connection in the impugned order. Such articulate order containing valid reasons cannot legally be set aside in exercise of limited writ jurisdiction of this Court, unless the same is perverse and without jurisdiction. No such patent illegality or legal infirmity has been pointed out in the impugned order by learned Counsel for the Petitioners. Therefore, the same deserves to be and is hereby maintained in

the obtaining circumstances of the case.”(HC-P&H First Appellate Authority Vs. Chief Information Commissioner 2011) (Emphasis added).

The Himachal Pradesh High Court, in **HC-HP Jitender Bhardwaj 2012**, adds another “no no” when it holds:

“4. In so far as the petitioner's prayer for compensation is concerned, it is a settled position of law that disputed questions of fact cannot be adjudicated in a petition filed under Article 226 of the Constitution of India. Hence liberty is granted to the petitioner to take recourse of such remedies as are available to him in accordance with law.”

In another order the Punjab and Haryana High Court hints at limits to the writ jurisdiction, without actually making such restrictions explicit, except that they do not include scrutinising the comparative merits of candidates:

“10. Merely because the petitioner asserts that he is more qualified than the selected respondent Nos. 3 to 5 cannot be a ground to set-aside the recommendations made by the Search Committee, especially when it is not merit alone, which would be the determinative factor but there are other considerations as well. The petitioner has also not given the comparative merit of three selected candidates, which would have given an opportunity to the Court to assess that aspect as well. In any case, the mandate of the statute having been duly complied with and there being no violation of any statute/instructions, the Court, in exercise of its writ jurisdiction under Article 227 of the Constitution of India, would not go into the comparative assessment of merit of the candidates and scrutinize the same. The power of judicial review in such matters is limited and has to be exercised by the Court with due care and caution and not merely on the asking of the candidate without there being supportive material to substantiate such contention.”(HC-P&H Munish Kumar Sharma 2014)

b) Some debatable orders

Despite these judicial pronouncements, at least some HC orders seem to go beyond the writ jurisdiction and actually look at and re-appreciate the evidence. Two typical examples are described below.

In **HC-DEL Central Information Commission 2011**, the Delhi High Court seemingly examined and took a view on the evidence and then struck down the ICs assessment, holding that the time taken was reasonable, contrary to what was held by the CIC:

“10. Be it noted that information was supplied in respect of (i), (ii) and (iii) within the requisite period. As far information pertaining to other items are concerned, there is some delay. On a perusal of the information sought and the time consumed, we find that reasonable period has been spent and hence, that would tantamount to an explanation for delay caused by the officer concerned.

11. In view of the aforesaid, the reduction of the penalty by the learned single Judge is justified...”

In **HC-P&H Vimal Kumar Setia 2014**, the Punjab and Haryana High Court similarly evaluated the evidence and imposed its own appreciation over that of the IC, even quoting the lack of mala fide “intention” as a justification for reducing penalty for delay, even though the RTI Act only prescribes lack of mala fide as a mitigation for illegitimate refusal.

“1. Challenge in the present writ petition is to the show cause notice dated 24.07.2008 (Annexure P5) and the order dated 26.09.2008 (Annexure P8), passed by the State Information Commissioner, Punjab, whereby it had directed the petitioner to deposit ` 25,000/-, as penalty, under the Right to Information Act, 2005 (for short, the 'Act'), on account of delay in supplying the information.”

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“7. Section 20 of the Act provides that where the Public Information Officer, without any reasonable cause, does not furnish the information within the time specified or mala fide denies the request for information, penalty is to be imposed @ ` 250/- per day, from the date the application is received till the date the information is furnished and the total amount of such penalty shall not exceed ` 25,000/-. That the amount of maximum penalty had been imposed under the Act, this

Court is, thus, of the opinion that it would suffice, in the interest of justice, that amount of penalty is reduced to a sum of ` 15,000/-, in the facts and circumstances of the present case as in the present case, no mala fide intention, as such, is there and the petitioner has shown reasonable cause.

8. Accordingly, the present writ petition is partly allowed and the impugned order of the Commission is modified. The petitioner is directed to deposit a sum of ` 15,000/-, within a period of 4 weeks from today, failing which, the amount will be recovered from his salary/pay.”

Clearly there is a need for a much wider public debate on what is the legitimate role of high courts, relating to the RTI Act, under Articles 226 and 227 of the Constitution.

c) Chief Justices formulating rules under the RTI Act

Section 2(e) of the RTI Act defines “competent authority” to include the Chief Justice of India and the chief justices of the various high courts:

“2(e) “competent authority” means—

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(ii) the Chief Justice of India in the case of the Supreme Court;

(iii) the Chief Justice of the High Court in the case of a High Court;”

Apart from the powers of determining whether larger public interest warrants the disclosure of information otherwise exempt under section 8(1)(d) and (e), the other function given to a competent authority under the RTI Act is to formulate and notify the rules under this Act.

Rule-making power has been given to appropriate governments and competent authorities, under S. 27, 28 & 29 of the Act, with each being required to follow a distinct process.

“27. (1) The appropriate Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the cost of the medium or print cost price of the materials to be disseminated under sub-section (4) of section 4;

(b) the fee payable under sub-section (1) of section 6;

(c) the fee payable under sub-sections (1) and (5) of section 7;

(d) the salaries and allowances payable to and the terms and conditions of service of the officers and other employees under sub-section (6) of section 13 and sub-section (6) of section 16;

(e) the procedure to be adopted by the Central Information Commission or State Information Commission, as the case may be, in deciding the appeals under sub-section (10) of section 19; and

(f) any other matter which is required to be, or may be, prescribed.

28. (1) The competent authority may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(i) the cost of the medium or print cost price of the materials to be disseminated under sub-section (4) of section 4;

(ii) the fee payable under sub-section (1) of section 6;

(iii) the fee payable under sub-section (1) of section 7; and

(iv) any other matter which is required to be, or may be, prescribed

29. (1) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule

should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(2) Every rule made under this Act by a State Government shall be laid, as soon as may be after it is notified, before the State Legislature.”

Section 29(1) of the RTI Act requires the rules formulated by the central government to be laid before each house of Parliament, and lays down a procedure by which such rules can be amended, if they need to be. Though section 29(2) does require rules formulated by state governments to be laid before state legislatures, it does not specify whether the legislature can amend them, and it is not clear whether the process laid down in 29(1) for amending and approving the rules laid before Parliament is also applicable for rules laid before state legislatures.

No such procedure is provided for the rules formulated by competent authorities. Perhaps as a result of this lacuna, in many of the rules formulated by competent authorities (and to a lesser extent by state governments), there seem to be clauses that violate the spirit and letter of the RTI Act. It is a well settled judicial principle that rules formulated under a law can neither go beyond the provisions of that law, nor be in violation of them. In *SC UoI vs S. Srinivasan 2012*, the Supreme Court has cited various earlier SC orders in support of the principle that *“a rule must be in accord with the parent statute as it cannot travel beyond it.”*³¹

Unfortunately, various high courts seemed to have ignored this sound dictum.

i) Rules that violate the spirit of the law: This is a problem that plagues many laws, and not just the RTI Act. Essentially, the rules framed under the law are not in consonance with the letter and spirit of the law, and sometimes even contradictory to specific provisions and going beyond the limits set by the law.

As most laws allow some discretion in the framing of rules, there can be cases where the spirit of a law is bruised but the letter remains inviolate. In the RTI Act, section 7(5) specifies that:

“Provided that the fee prescribed under sub-section (1) of section 6 and sub-sections (1) and (5) of section 7 shall be reasonable and no such fee shall be charged from the persons who are of below poverty line as may be determined by the appropriate Government.”

In response, the Central Government has laid down an application fee of ₹10, and ₹2 per page for photocopying. This seems reasonable and in keeping with both the letter and spirit of the law. However, some other governments and some courts, as competent authorities, have prescribed fees which runs into hundreds of rupees. The High Court of Allahabad³² prescribes an application fee of ₹250 for information relating to tenders, business contract, and other such. Many high courts prescribe an application fee of ₹100 (Gauhati³³, Rajasthan³⁴, and Sikkim³⁵). For others, it varies from ₹20 to ₹50. Though certainly in violation of the spirit of the act, technically they seem legal.

Of relevance here is a circular³⁶ sent out by the DoPT:

“Sections 27 and 28 of the Right to Information Act, 2005 empower the appropriate Governments and the Competent Authorities to make rules to prescribe, inter-alia, the fees payable under the Act. In exercise of the powers. the Central

³¹ Relevant extracts from this order are reproduced in annexure 7(c).

³² Rule 4, *Allahabad High Court (Right to Information) Rules 2006*, Notification no. 3530/seven-Nyaya- 1-2006, dated 20th September 2006. Access from http://www.allahabadhighcourt.in/event/rti_rules_20-09-06.html. Latest amendment- http://www.allahabadhighcourt.in/rti/rti_14-04-13.pdf.

³³ *Ibid.*

³⁴ *Rajasthan Right To Information (High Court and Subordinate court) Rules 2006, op.cit.* Rule 9 sub rule (i)

³⁵ Rule 7, *The High Court of Sikkim RTI (Regulation of Fee, Cost and Misc.) Rules, 2007*, Notification no. 7/HCS dated 21st May 2007

³⁶ Circular No. N0.F. 1/5/2011 -IR dated 26th April, 2011, page 18 of *Compilation of OMs & Notifications on Right to Information Act, 2005*. Op. Cit.

Government, State Governments, High Courts etc. have notified rules. It has been observed that the fee prescribed by different appropriate Governments/Competent Authorities is at great variance.

2. The 2nd Administrative Reforms Commission has, in this regard recommended that the States should frame Rules regarding application fee in harmony with the Central Rules and ensure that the fee should not become a disincentive for using the right to information.

3. *All the States/Competent Authorities are, therefore, requested to kindly review their Fee Rules and to prescribe fee in consonance with the fee prescribed by the Government of India. A copy of the Right to Information (Regulation of Fee and Cost) Rules, 2005 notified by the Government of India is enclosed for ready reference.*” (Emphasis added).

ii) Rules that violate the letter of the law: Some typical examples include the rules formulated under the RTI Act by the high courts of Calcutta³⁷, Gauhati³⁸, Gujarat³⁹, Punjab and Haryana⁴⁰, and Tripura⁴¹, which specify that penalty for delay would be ₹50 per day, with a maximum of ₹500, and for knowingly supplying false information it would be ₹1000. This is despite the fact that section 20(1) of the RTI Act lays down the penalty as ₹250 per day for delay, with an overall maximum of ₹25,000 for delay or any other violation. The RTI Act does not allow competent authorities or governments to vary the quantum of penalty.

All of these high courts, except Punjab and Haryana, also provide in their rules that the penalty “*may be imposed by the appellate authority*”. But in the RTI Act only information commissions are authorized to impose penalties, as specified in section 19(8)(c) and 20(1). Does this mean that the high courts listed above are assuming that their officers will not be answerable to the information commission? But this, again, would be without statutory support. Alternatively, are the PIOs in these high courts subject to being penalized both by the appellate authorities, and then a higher amount by the IC? But apart from being in violation of the RTI Act, this hardly seems fair to them!

Similarly, many high courts add, through their rules, exemption for disclosing information, over and above those provided for in the RTI Act, and in most cases without the overrides provided in the RTI Act (public interest, not deniable to Parliament, etc.). The High Court of Delhi exempts from disclosure “*Such information which relates to judicial functions and duties of the Court and matters incidental and ancillary thereto*”⁴², and “*Any information affecting the confidentiality of any examination conducted by Delhi High Court including Delhi Judicial Service and Delhi Higher Judicial Service. The question of confidentiality shall be decided by the Competent Authority whose decision shall be final.*”⁴³ These are not only beyond the exemptions prescribed by law, but also shift the power to finally adjudicate on what is exempt and what is not, from the information commissions, as laid down in section 23 of the RTI Act, to the competent authority, giving them a new role not provided for in the law.

The Delhi High Court also specifies, in its rules, that “*Information which is to be furnished and access to records shall be subject to the restrictions and prohibitions contained in rules/regulations ... in force from time to time which may have been notified or implemented by this Court.*”⁴⁴ This, again, seems to add exemptions beyond what is authorized by the law, besides being in violation of section 22 of the RTI Act which holds that:

³⁷ Rule 7 sub rule (i) and (ii), *The Calcutta High Court (Right to Information) Rules 2006*, Notification no. WB/CPS/K-164 (Part 1)/2007, dated 2nd February 2007 (<http://calcuttahighcourt.nic.in/RTI/RTIACT.pdf>)

³⁸ *Gauhati High Court Right to information Rules, 2008 op.cit*, Rule 8 subsection (i) and (ii)

³⁹ Rule 6 sub rule (1) and (2), *Gujarat High Court (Right to Information) Rules 2008*, Notification no. C – 3001/2005 dated 25th September 2007 (http://gujarathighcourt.nic.in/rti/RTI_RULES_2005.pdf)

⁴⁰ Rule 9 sub rule (i) and (ii), *High Court of Punjab and Haryana (Right to Information) Rules 2007* (http://highcourtchd.gov.in/sub_pages/left_menu/Rules_orders/rti_rules/pdf/rti_highcourt.pdf)

⁴¹ Rule 8 sub-rule (i) and (ii), *High Court of Tripura (Right to Information) Rules, 2013*, No. F.3 (35) – HC/2013/13,444, dated 9th September 2013 (<http://thc.nic.in/RTI.pdf>)

⁴² Rule 5 (a), *Delhi High Court (Right to Information) Rules, 2006*, notification no. 46/Rules/DHC, dated 22nd January 2009 (<http://delhihighcourt.nic.in/rtirules.asp>)

⁴³ Rule 5 (c), *Delhi High Court (Right to Information) Rules, 2006*, notification no. 180/Rules/DHC, dated 11th August 2006

⁴⁴ *Ibid.* Rule 6

“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

The Kerala High Court lays down in its rules that “No application for information or document relating to a policy matter under consideration shall be entertained.”⁴⁵ This again seems to add an exemption that is not listed in the RTI Act, and in fact appears to directly violate section 4(1)(c) which obliges public authorities to “publish all relevant facts while formulating important policies or announcing the decisions which affect public;” (Emphasis added).

Many high courts, again in disregard of section 22 (quoted above) have specified in their rules that information that can be accessed under the high court rules will not be provided under the RTI Act. These include the high courts of Madras⁴⁶, Madhya Pradesh⁴⁷, and Rajasthan⁴⁸. Going one better, the Tripura High Court specifies in its rules that “Decision which are taken administratively or quasi judicially, information thereof shall be available only to the affected persons”⁴⁹. This again adds an exemption that is not in the statute.

The Tripura High Court also specifies in its rules that “Separate application shall be made in respect of each subject”⁵⁰, as do many high courts, again without the sanction of the law. The Tripura HC rules also specify that a separate application needs to be filed “in respect of each year to which the information relates”⁵¹, again without legal support.

The Gujarat High Court RTI rules directly violate section 6(3) of the RTI Act by specifying that “If the requested information does not fall within the jurisdiction of the authorised person, it shall order return of the application to the applicant in Form C as soon as practicable... The application fee deposited in such cases shall not be refunded.”⁵²

The Gujarat HC rules also specify that “No Judicial Officer shall be compelled to appear in person before any Authority, State Chief Information Commissioner or State Information Commissioner under the Right to Information Act, 2005, if he has made necessary arrangement for production or supply of materials required under the said Act.”⁵³ This seems to be in violation of section 18(3)(a) of the RTI Act that lays down that “3. The Central Information Commission or State Information Commission, as the case may be, shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:— (a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;”

Other deviations include the setting of an arbitrary time limit of three months for the receipt of the “required information or decision on the disposal of the application”, presumably from the information commission, after which the papers will be destroyed and a fresh application will have to be filed (Orissa HC rules⁵⁴), the requirement to make a declaration that “the motive for obtaining such information is proper and legal” (Rajasthan HC rules⁵⁵). It would be interesting to discover what the HC considers “proper” motivations!

⁴⁵ Rule 13, Kerala High Court (Right to Information) Rules 2006 (http://rti.kerala.gov.in/rules/rtirules2006_KeralaHighcourt.pdf)

⁴⁶ Rule 4 Sub Rule (b), Madras High court Right to Information(Regulation of Fee and cost) Rules, 2007, Notification no. ROC No. 3689/2013/RTI (<http://www.hcmadras.tn.nic.in/rtia.pdf>)

⁴⁷ Rule 8 sub rule (1) and (2), Madhya Pradesh (Right to Information) Rules 2006, dated 4th March 2006 (<http://www.mphc.gov.in/PDF/rti/RTIINFO.pdf>)

⁴⁸ Rule 10 sub rule (1) (vi), Rajasthan Right To Information (High Court and Subordinate court) Rules 2006, GSR 66 (<http://ric.rajasthan.gov.in/includes/rti-rules-2006.pdf>)

⁴⁹ High Court of Tripura (Right to Information) Rules, 2013 *Op. cit.* Rule 4 Sub rule (vi)

⁵⁰ *Ibid.* Rule 3 sub rule (v)

⁵¹ *Ibid.*

⁵² Gujarat High Court (Right to Information) Rules 2008, *Op. cit.* Rule 4 Sub rule (1)

⁵³ *Ibid.* Rule 7

⁵⁴ Rule 4 sub rule (4), Orissa High Court Right to Information Rules 2005, Notification no. 77, dated 23rd February 2006 (<http://www.orissahighcourt.nic.in/pdf/rti/RTI.pdf>)

⁵⁵ Rajasthan Right To Information (High Court and Subordinate court) Rules 2006 *op. cit.* Rule 10 sub rule (2) (i)

Despite a wide recognition of the fact that many of the rules listed above are in violation of the RTI Act, and despite over ten years having passed since the RTI Act and most of these rules were notified, little seems to have been achieved towards establishing harmony between the law and various sets of rules.

As many of these rules are those formulated by high courts, and as often high courts set the example that is followed by others, perhaps the high court order described below would help in identifying the dimensions of the problem.

In *HC-MEG Belma Mawrie 2015* the HC held that the information commission has no power to rule on the validity of the High Court of Meghalaya RTI rules as, among other things, “*an authority which is a creature of a statute cannot decide whether the very statute of which he is a creature is a valid statute or not*”, and as the IC is a creature of the RTI Act, it is powerless to intervene. The court went on further to hold that even the High Court, while listening to an appeal against an order of the IC, under the powers available to it under Article 226/227 of the Constitution cannot rule on such matters. It can only adjudicate on a writ brought directly to the HC. Given the complicated legal arguments involved, extensive extracts from the order are given in annexure 7b.

The various HCs need, perhaps, to be reminded of the numerous Supreme Court orders cautioning courts to not go beyond the statutes passed by Parliament. Though under discussion are the rules made by the high courts, and not their judicial orders, however the same principles must apply as these rules are also a creation of the court, or perhaps the chief justice of the court, and if the earlier quoted Meghalaya High Court order is correct, cannot be amended by anyone else. Perhaps it might be worth quoting here at least one relevant Supreme Court order, which is also discussed elsewhere in the report.

In *SC Thallapalam 2013* the SC cited a large number of SC orders:

“12....In Magor and St. Mellons Rural District Council v. New Port Corporation (1951) 2 All ER 839(HL) stated that the courts are warned that they are not entitled to usurp the legislative function under the guise of interpretation. This Court in D.A. Venkatachalam and others v. Dy. Transport Commissioner and others (1977) 2 SCC 273, Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and others (2001) 4 SCC 139, District Mining Officer and others v. Tata Iron & Steel Co. and another (2001) 7 SCC 358, Padma Sundara Rao (Dead) and others v. State of Tamil Nadu and others (2002) 3 SCC 533, Maulvi Hussain Haji Abraham Umarji v. State of Gujarat and another (2004) 6 SCC 672 held that the court must avoid the danger of an a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provisions to be interpreted is somehow fitted. It is trite law that words of a statute are clear, plain and unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences, meaning thereby when the language is clear and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the statute speaks for itself. This Court in Kanai Lal Sur v. Paramnidhi Sadhukhan AIR 1957 SC 907 held that “if the words used are capable of one construction only then it would not be open to courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.”

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“43.....Court cannot, when language is clear and unambiguous, adopt such a construction which, according to the Court, would only advance the objective of the Act.”

The deviant high court rules quoted earlier clearly suggest that the concerned high courts, while formulating their rules, are not only ‘usurping the legislative function’ but in some cases actually directly overriding the will of the Parliament without either the justification of legal interpretation, or any other valid Constitutional basis.

If the rules made by the chief justices of high courts are neither placed before Parliament nor are to be adjudicated by the information commission, then clearly a public debate is required to determine what is the best way of reforming deviant high court rules.

d) Supreme Court as a public authority

The judiciary has played a seminal role in recognizing and furthering peoples' right to information in India. Apart from being the final adjudicatory authority for the RTI Act, the Supreme Court is also a public authority under the RTI Act. During the course of the last ten years, scores of RTI applications have been filed by citizens seeking information from the courts, many of which have themselves required judicial adjudication.

In the last few years, five such matters reached the SC, three of which were referred to a constitution bench. However, in two of the five cases, in which the Delhi High Court had upheld the decision of the PIO of the SC to deny the information sought, the SLP was dismissed by the SC at the stage of admission. Unfortunately, these cases raised matters of great public interest but were dismissed by the SC without providing any details or reasons in their orders.⁵⁶ One of them sought information, using the RTI Act, about cases pending with the Supreme Court in which the arguments had already been heard but orders had been reserved. In the other matter, the applicant sought the total amount of medical expenses of individual judges reimbursed by the Supreme Court, citing a Delhi High Court ruling of 2010 which stated that "*The information on the expenditure of the government money in an official capacity cannot be termed as personal information*".

i. Cases referred to the constitutional bench: The three cases dealing with access to information under the RTI Act, which have been referred to a constitution bench of the Supreme Court, are described below.

In the first case, an RTI applicant filed a request to the SC in 2009 seeking a copy of the complete correspondence, with file notings, exchanged between the CJI and other concerned constitutional authorities relating to the appointment of Justice HL Dattu, Justice A. K. Ganguly, and Justice RM Lodha as judges of the Supreme Court, superseding the seniority of Justice AP Shah, Justice AK Patnaik, and Justice VK Gupta. Information was denied by the CPIO, however, the CIC directed that the information sought be furnished. The CPIO of the SC appealed directly to the Supreme Court against the order of the CIC.

In the second case, the RTI applicant asked if any declaration of assets was ever filed by the judges of the Supreme Court or High Courts to the respective CJIs, as per the 1997 resolution of the SC, which requires judges to declare their assets, *held by them in their own name or in the name of their spouse or any person dependent on them, to the chief justice*. The information was denied to the applicant by the PIO of the Supreme Court on the ground that this information was not held or under the control of the registry of the SC and, therefore, could not be furnished. The applicant then approached the CIC in appeal where the counsel for the PIO of SC stated that the declarations are submitted to the Chief Justice of India not in his official capacity but in his personal capacity. The CIC directed that the information sought by the appellant be provided.

The order of the CIC was challenged by the SC in the Delhi HC and the points culled out for consideration by the single member bench of the HC were:

- (1) Whether the CJI is a public authority;
- (2) Whether the office of CPIO of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;
- (3) Whether the asset declarations by Supreme Court judges, pursuant to the 1997 Resolution is "information", under the Right to Information Act, 2005;

⁵⁶ *SC Subhash Chandra Agarwal 2015 & SC Commodore Lokesh K. Batra (Retd.) 2016*

- (4) If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act;
- (5) Whether such information is exempt from disclosure by reason of Section 8(1) (j) of the Act;
- (6) Whether the lack of clarity about the details of asset declaration and about their details, as well as lack of security renders asset declarations and their disclosure, unworkable.

The single judge bench ruled that the CJI and the office of the Chief Justice of India were public authorities under the RTI Act. The HC held that the information pertaining to declarations given to the CJI and the contents of such declarations were "information" as defined in the RTI Act and were not held by the CJI in a "fiduciary capacity".

The order went on to state that though the contents of asset declarations were entitled to be treated as personal information under Section 8(1)(j), however, *“For the purposes of this case the particulars sought do not justify or warrant that protection; all that the applicant sought is whether the 1997 resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8 (1)(j).” (HC-DEL CPIO, SCI 2009)*⁵⁷. This order of the single judge of the Delhi HC was challenged by the CPIO of the SC before a larger bench of the Delhi HC.

Subsequently, this judgement of the single judge was upheld by a three-judge bench of the HC, which stated:

“...A Judge must keep himself absolutely above suspicion, to preserve the impartiality and independence of the judiciary and to have the public confidence thereof...Accountability of the Judiciary cannot be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Behind this notion is a concept that the wielders of power – legislative, executive and judicial – are entrusted to perform their functions on condition that they account for their stewardship to the people who authorise them to exercise such power. Well defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant,” (HC-DEL Secretary General, Supreme Court of India 2010)

This judgement was subsequently challenged by the CPIO before the Supreme Court.

In the third case, quoting a media report, an RTI application was filed with the SC seeking copies of correspondence between the then CJI and a judge of the Madras High Court regarding the attempt of a Union Minister to influence judicial decisions of the said High Court. The applicant also sought information regarding the name of the concerned Union Minister.

The PIO denied the asked for information claiming that it was not maintained nor available in the registry of the SC. The CIC, in its order, overturned the decision of the PIO stating that:

“...we are not convinced that the disclosure of information sought by appellant Shri S.C. Agrawal would in any way infringe on the constitutional stature of Hon’ble Justices of the High Court or indeed in any way diminish the exalted status that we readily concede is granted to him in a democracy such as ours. The implication in this appeal is that, in fact, there has been an attempt to diminish that exalted status by unseemly pressure and the information sought is a means to expose such an unworthy attempt, if any.” (CIC/00426 dated 06.01.2009).

Bypassing the Delhi HC, the CPIO of the Supreme Court directly moved a petition before the SC challenging the CIC order to disclose information.

In its order the Supreme Court (*SC Central Public Information Officer 2010*), while hearing the case related to correspondence between the CJI and other constitutional authorities about appointment of judges (discussed above), tagged the other two cases (asset disclosure and correspondence between the CJI and the judge of the Madras HC) with the matter. The SC order stated that the consideration of a larger bench was

⁵⁷ Relevant extracts of the order reproduced in annexure 7(c).

required as grave constitutional issues were at stake, including the need to balance the independence of the judiciary and the fundamental constitutional right of citizens to freedom of speech and expression.

“12. Having heard the learned Attorney General and the learned Counsel for the respondent, we are of the considered opinion that a substantial question of law as to the interpretation of the Constitution is involved in the present case which is required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced.”

In addition, the SC listed three sets of questions which, according to them, raised substantial questions of law as to the interpretation of the constitution:

- i. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?
- ii. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?
- iii. Whether the information sought for is exempt under Section 8(1)(j) of the Right to Information Act?

A three-judge bench of the Supreme Court heard all the matters discussed above in August 2016 and referred them to a Constitution Bench⁵⁸.

While the first two sets of questions do seem to relate to constitutional issues, like the adverse impact peoples' right to information might have on judicial independence, or amount to interference in the functioning of the judiciary, or compromise its credibility, it is not clear how the third question relating to exemption under section 8(1)(j) of the RTI Act raises any constitutional concerns.

Although the matters are *sub-judice* and the constitution bench is yet to examine the cases, given below are some judgements of the Supreme Court in which the apex court has discussed one or more of these issues in relation to the judiciary or other public functionaries.

ii. Some relevant Supreme Court orders: While stressing the need for transparency to restrain any abuse of judicial powers and to ensure accountability of the judiciary, the Supreme Court in **SC Manohar 2012** stated that, *“It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny.”* The SC ruled that all judicial, quasi-judicial and administrative orders must contain detailed reasoning and that no order or decision is complete till its reasoning is recorded.

“...(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.....

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights ...”

⁵⁸ SC Central Public Information Officer 2016

To ensure transparency and improve the process of selection of judges, in the ***SC Supreme Court Advocates-on-Record Association 2015***, a five judge bench laid down broad guidelines for the Government of India which was tasked with the responsibility of preparing the Memorandum of Procedure for the appointment of judges. Among other things, the guidelines stated that the eligibility criteria and procedure for selection of judges must be put up on the website of the court concerned and the Department of Justice. In addition, they required provision for an appropriate procedure for minuting the discussions including recording the dissenting opinion of the judges in the collegium. The government was asked to take the following factors into consideration:

“Eligibility criteria

The Memorandum of Procedure may indicate the eligibility criteria, such as the minimum age, for the guidance of the collegium....

Transparency in the appointment process

The eligibility criteria and the procedure as detailed in the Memorandum of Procedure for the appointment of Judges ought to be made available on the website of the Court concerned and on the website of the Department of Justice of the Government of India. The Memorandum of Procedure may provide for an appropriate procedure for minuting the discussions including recording the dissenting opinion of the Judges in the collegium while making provision for the confidentiality of the minutes consistent with the requirement of transparency in the system of appointment of Judges....

Complaints

The Memorandum of Procedure may provide for an appropriate mechanism and procedure for dealing with complaints against anyone who is being considered for appointment as a Judge.

Miscellaneous

The Memorandum of Procedure may provide for any other matter considered appropriate for ensuring transparency and accountability including interaction with the recommendee(s) by the collegium of the Supreme Court, without sacrificing the confidentiality of the appointment process.”

e) High courts as public authorities

The high courts are also public authorities and subject to all the provisions of the RTI Act. In so far as they are PAs, they are also subject to the adjudicatory jurisdiction of the information commission within whose jurisdiction they fall. Consequently, there have been various cases where the PIOs of high courts have appealed against orders of information commissions to the High Court, and even the Supreme Court. Many of these cases have become enigmatic because a judicial view seems to be emerging that even the administrative side of the courts is not subject to the RTI Act in the same manner that governments and other public authorities are. Part of this problem might be a result of the rules of some of the high courts, as discussed above. But there are also other issues involved, as can be seen from the cases described below.

i) Adding exemptions: In ***HC-MAD The Registrar General Vs. R.M. Subramanian 2013*** the HC seemed to have held, among other things, that information whose disclosure might “*make an inroad to the proper, serene function of the Hon'ble High Court being an Independent Authority under the Constitution of India*” cannot be disclosed. It further went on to hold that the Chief Justice of the High Court had “*discretionary powers either to furnish the information or not to part with the information, as prayed for by any applicant much less the 1st Respondent/Petitioner*”. It went on to hold that information can be exempted from disclosure if it “*will prejudicially affect the confidential interest, privacy and well being of the High Court*”⁵⁹.

⁵⁹ Longer extract quoted in annexure 7(c).

Very similar reasoning was found in *HC-MAD The Registrar General, High Court of Madras Vs. K. Elango and The Registrar, The Tamil Nadu Information Commission 2013*⁶⁰. In *HC-MAD The Public Information Officer Vs. The Central Information Commission 2014* the Madras High Court reiterated the points made in the above two orders, and added some of their own, holding, among other things, that applicants for information under the RTI Act, notwithstanding section 6(2), must establish their *locus standi* and have good reasons for seeking the information they are seeking (fortunately, the second part of the order was subsequently withdrawn by the same bench of the Madras High Court). They also held that applicants cannot seek copies of the documents that they have themselves submitted to the public authority, like copies of their complaints, and that information that pertains to *sub-judice* matters cannot be disclosed. None of these are exemptions were available in the RTI Act and nor did the HC argue that they were⁶¹.

ii) Disseminating materials in local languages: The multiplicity of languages in India can often become a hindrance to the proper dissemination of information. Those not familiar with English, and a large proportion of the poorer population and the rural dwellers are not, ask for information in the local language. Where the information being asked for is already available in the local language then it is not a problem. But where the information sought is either with a public authority which functions in English (like the Supreme Court and the high courts), or in a language other than the local language of the applicant, the problem becomes acute.

Sometimes people living in one language region seek information from another language region, and this also becomes a problem. Even among information commissions, some function in English, others in Hindi, or in their regional language, making it difficult for applicants who are not fluent in the language of the commission.

As the cost of translation, especially into non-local languages for which translators might not be easily available, could be high, compliance with section 4(4), which requires dissemination of information in local languages, can be somewhat costly.

Given the need to ensure that information is accessible to the poor, the semi-literate, or to those who cannot follow English, it is heartening that the Uttarakhand High Court, in *HC-UTT State Consumer Disputes Redressal Commission 2010*, held that as Hindi was the local language of Uttarakhand, in keeping with the provisions of the RTI Act information must be provided in the local language, especially if so requested.

The same High Court (and the same judge) reiterated this in *HC-UTT High Court of Uttarakhand 2010*, where it upheld the general principle enunciated in the earlier order, but went on to hold that though all other documents should be supplied in Hindi, if copies of any records with the High Court are asked for, and if these records are in English, then they need not be translated. The HC maintained that as the RTI Act provides access to records “held”, and as they are held in English by the HC, then there is no obligation to translate them. Second, the cost of translation would be huge and this would go against the dictum of the RTI Act to be cost effective.

“34. It is, however, made clear that in case Respondent No. 3 also seeks any "record" in the matter they will be supplied only in language they are available or "held" by the High Court. In other words, if the record itself is in English, the same need not be translated in Hindi. Only the "question answer form", and the reply given by the Public Information Officer have to be in Hindi, when asked for.

35. This aspect needs clarification. It is true that the proceedings in a High Court are in English language. Therefore by and large "records" are in English. Yet is the public information officer also bound to supply the "record" in "Hindi",

⁶⁰ Extract from order at annexure 7(c).

⁶¹ Extract from order at annexure 7(c).

even when it is specifically requisitioned though originally the records are in English. The answer to this would be in negative. This is not the intent or the mandate of the Act. This is for two reasons. Firstly, the definition of "right to information" itself states that a citizen has access to information which is "held" by or under the control of any public authority. Obviously since the "information" in the form of a record is "held" by the public authority in English, it has to be supplied in that language. Secondly, even Section 4(4) of the Act, which has been referred above, states that the obligation of the Public Authority is to "disseminate" "information" in local language but with considerations of "local language" as well as "cost effectiveness" alongwith other consideration. The cost of translation of all record in "Hindi" would be immense and would be practically not possible. As such the records can only be given as they exist. The public authority i.e. High Court in the present case, is not obliged to translate records into Hindi, and furnish them even when requisition is so made."

The argument that as the documents were held in English, and as the RTI Act provides only for access to documents held, therefore they need not be translated would then be applicable to all documents held anywhere, for they would all be held in some language. Such an interpretation of the law would make section 4(4) ineffective.

In numerous Supreme Court orders judges are cautioned against ignoring words in laws. In **SC CIC Manipur 2011** the SC holds that:

"41. It is well-known that the legislature does not waste words or say anything in vain or for no purpose. Thus a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons."

In the same order, *Aswini Kumar Ghose and another v. Arabinda Bose and another - AIR 1952 SC 369*, the SC is quoted as holding that:

"It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute".

Similarly, it quotes from *Rao Shiv Bahadur Singh and another v. State of U.P. - AIR 1953 SC 394* thus:

"It is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application".

Many other supportive SC orders, along the same lines, are quoted in **SC Thallapalam 2013** (see chapter 1(c) for relevant extracts).

f) Agenda for action

- i. The Supreme Court needs to reiterate periodically the limitations of a writ jurisdiction, especially in relation to the RTI Act, to all high courts. It would be a desirable practice for the Supreme Court to take cognisance of public feed-back about common disregard of their orders by high courts, and by other judicial or quasi-judicial authorities, including administrative institutions, and issue periodic orders so that repeated violations could result in strictures or even contempt proceedings.
- ii. Given the problems with various rules formulated under the RTI Act, the large number of rules that an applicant has to become familiar with, and the resultant confusion among the public, the Parliament should consider one uniform set of rules for the whole country.
- iii. In the meanwhile, the government should widely circulate the Supreme Court orders (**SC UoI vs S. Srinivasan 2012** and **SC Thallapalam 2013**) that reiterate the illegality of rules going beyond or being in violation of the laws under which they have been framed.
- iv. There are many existing orders of the SC which have repeatedly warned the judiciary and other agencies against usurping the legislative function of Parliament, under the guise of interpreting statutes. A similar caution needs to be issued regarding the usurping of the legislative function of Parliament by making rules that go beyond or violate a law passed by Parliament. The SC could

also be moved to strike down those provisions of the various existing rules, including rules of high courts, which suffer from such legal infirmities.

- v. HCs also need to look at their own rules and ensure they are not falling foul of the letter and spirit of the RTI Act.

5. Functioning of information commissions

Major Issues

Information Commissions (ICs) under the Indian RTI Act are independent, have a high stature, extensive powers including the power to impose penalties on officials, and are the final appellate authority under the RTI law. Commissions have been set up at the Centre (Central Information Commission) and in the states (state information commissions). Each commission consists of a chief information commissioner and up to 10 information commissioners.

ICs have the crucial task of deciding appeals and complaints from persons who have been unable to secure information in accordance with the RTI Act, or are aggrieved by other violations of the law. RTI applicants can file appeals to the commission against decisions of the first appellate authority, or if they have not received any decision within the stipulated period.

Consequently, ICs are critical to the RTI regime. In fact, many believe that the health of the regime primarily depends on how effective and pro-active the information commissions are. Right from the start, enormous public attention has been focused on information commissions, and their performance has been extensively debated.

a) ICs without commissioners

The assessment found that several ICs were non-functional or were functioning at reduced capacity as the posts of commissioners, including those of chief information commissioners, were vacant during the period under review. The Assam SIC was without a chief from January 1, 2012 till December 2014⁶². In fact, the commission did not have a single commissioner from 16th March, 2014 to December, 2014 and therefore no appeals or complaints were heard in this period.

The Manipur SIC was non-functional for more than a year from March 2013 to May 2014, as there was no commissioner. The SIC was without a chief for more than four years- from 2011 till 2015.

The SIC of Goa was defunct for most of 2015 as after the retirement of the sole commissioner in January 2015, no new appointments were made till January 2016⁶³. In Rajasthan, the information commission was not functional for 12 months, between April 2011 and April 2013⁶⁴, while the Madhya Pradesh IC was not functioning for over a year between 2013 and 2014. The Central Information Commission was without a chief for almost nine months and it was only on the intervention of the Delhi HC on a petition by RTI activists, that the chief was appointed in June 2015⁶⁵.

The non-functioning of information commissions amounts to a violation of peoples' right to information, as ICs are the final adjudicators under the RTI law. If there is a denial of information by a public authority, the only recourse under the RTI Act is to seek justice from the ICs. Among other problems, non-functional ICs result in a huge backlog of appeals and complaints and the consequent long delays, as is evident in the case of the Assam SIC, where the waiting time is estimated to be 30 years (see section f).

⁶² Assam SIC annual report, 2014-15

⁶³<http://www.thehindu.com/news/national/other-states/goa-state-information-commission-functional-after-11-months/article8054603.ece>

⁶⁴ From April 2011 to September 2011, there were no ICs in the SIC. From 14.9.2012 till 16.4.2013 the Rajasthan SIC stopped working due to the SC Namit Sharma order.

⁶⁵ <http://www.firstpost.com/india/cic-may-finally-have-a-chief-as-centre-tells-delhi-hc-candidates-shortlisted-2256808.html>

b) Transparency in functioning of ICs

To assess how much information the commission proactively disclosed about itself, and how up-to-date and easily accessible this information was, IC websites were accessed and analysed. An attempt was made to access the websites of all 28 information commissions⁶⁶ (1 CIC & 27⁶⁷ State ICs) across the country. The websites of two state information commissions, Goa and Jharkhand, could not be accessed in September 2016. Both the websites (<http://goasic.gov.in/> and <http://www.sicjharkhand.in/>) gave the same error message: “*This page can’t be displayed*” along with a suggestion to “*Make sure the web address is correct*”.

Eight (31%) of the 26 IC⁶⁸ websites analysed did not provide information on the number of appeals and complaints received and disposed in 2014 and 2015. These were the websites of the information commissions of Andhra Pradesh, Arunachal Pradesh, Bihar, MP, Manipur, Tamil Nadu, Tripura and Uttarakhand.

Ten of the 26 SIC websites accessed did not provide information on the number of appeals/complaints pending at the end of 2014 or 2015. These were the SICs of Andhra Pradesh, Arunachal Pradesh, Bihar, Gujarat, MP, Manipur, Mizoram, Tamil Nadu, Tripura and Uttarakhand.

In seven of the 26 IC websites analysed, the decisions and orders of the commission could not be directly accessed. In some, decisions could only be retrieved by inputting the appeal number, or name of the appellant or complainant, while in others there was no link to access the orders and decisions. ICs for which orders could not be accessed directly for 2016 were Gujarat, Haryana, Kerala, Madhya Pradesh, Sikkim, UP and Chhattisgarh.

In Rajasthan, in order to view decisions of the commission, an elaborate disclaimer had to be agreed to! (see box 3).

Box 3: Disclaimer of Rajasthan SIC website	
Disclaimer	
RAJASTHAN INFORMATION COMMISSION	
The contents and information provided on this website is for public information only, to facilitate a quick and easy access. It is likely that some error/omission may occur on the website, hence no legal liability is assumed on basis of the contents/information on the website. The authenticated copy of the concerned information could be obtained from the competent authority by lawful means. Neither the Rajasthan Information Commission nor RajCOMP Info Services Ltd. (RISL) or Department of Information Technology & Communication, Rajasthan is responsible for any damages arising from the use of the content of this site.	
<input checked="" type="radio"/>	I Agree
<input type="radio"/>	Do not Agree

For institutions that are vested with the responsibility of ensuring that all public authorities function transparently and adhere to the letter and spirit of the RTI Act, and fulfill their legal obligation for proactive disclosures, it is disappointing to note the dismal performance of

ICs in terms of proactively disclosing basic information about their own functioning. This in itself is a violation of Section 4 of the RTI Act, as the provision requires commissions by virtue of being public authorities under the Act, to proactively disclose information on their functioning and the details of decisions taken by them.

⁶⁶ The SIC of Telangana had not been set up at the time of publication of this report

⁶⁷ Jammu and Kashmir has its own RTI Act and is therefore not covered in this report. All union territories come under the jurisdiction of the Central Information Commission.

⁶⁸ As mentioned above, the websites of SICs of Goa & Jharkhand were not accessible and hence are excluded when calculating percentages.

c) *Annual report*

To ensure periodic monitoring of the functioning of the commissions, section 25 obligates each commission to prepare a “*report on the implementation of the provisions of this Act*” every year, which is to be laid before Parliament or the state legislature. The performance of a majority of the ICs in terms of publishing annual reports and putting them in the public domain is very dismal.

Table III: Availability of Annual Report on the IC websites			
	ICs	Latest year for which annual report available	
		as on 20.9.2014	as on 20.9.2016
1	AP	2012	2013
2	ARU	2007	2007
3	ASS	2009	2015
4	BIH	2012	2012
5	CHH	2012	2014
6	CIC	2013	2015
7	GOA	2008	WNA
8	GUJ	2013	2015
9	HAR	2006	2012
10	HP	2013	2014
11	JHA	2011	WNA
12	KAR	2013	2015
13	KER	2011	2011
14	MP	NA	NA
15	MAH	2013	2014
16	MAN	NA	NA
17	MEG	2012	2014
18	MIZ	2013	2015
19	NAG	2013	2015
20	ODI	2012	2013
21	PUN	2008	2011
22	RAJ	2013	2015
23	SIK	NA	2014
24	TN	2008	2011
25	TRI	NA	NA
26	UP	NA	NA
27	UTT	NA	2014
28	WB	2009	2014

NA = Not available; WNA = website not accessible

The analysis of the IC websites revealed that many of the commissions had not posted their annual reports on the web and very few had updated the information. As the analysis was done in September 2016, it would be reasonable to expect that annual reports upto 2015 would be available on the websites. Yet, 21

out of 28 ICs (75%) did not have on their sites the annual report for 2015 (table III). In fact, four of these, the SICs of MP, Manipur, Tripura and UP, had no annual reports on their websites.

Transparency is key to promoting peoples’ trust in public institutions. By failing to disclose information on their functioning, ICs continue to evade real accountability to the people of the country whom they are supposed to serve. In addition, answerability to the Parliament and state legislatures is also compromised when such reports are not submitted, as legally mandated.

d) *Number of appeals and complaints dealt with by ICs*

Information on the number of appeals and complaints dealt with by ICs was provided for different time-periods across IC websites. While some ICs provided data for the calendar year, others provided information in terms of the financial year. and others did not give information for all the months under review. Therefore, in order to present comparable data, the monthly average was calculated which was then used to estimate the number of appeals and complaints dealt with by the ICs for 2014 & 2015. Similarly, for 2012 and 2013, an estimate was evolved using the data presented in the RaaG 2014⁶⁹ report. The estimates are presented in table IV, while the raw data used to arrive at the estimates is given in annexure 6.

⁶⁹ Table 9.2, page 108, Chapter 9, RaaG 2014, Op. Cit.

Comparing data for 18 ICs where information for both time periods was available, an estimated 3,41,003 appeals and complaints were received and 2,87,782 disposed between January 2012 and December 2013 while the corresponding figures for January 2014 to December 2015 are 3,47,977 (received) and 3,19,912 (disposed).

Table IV: Estimated number of appeals & complaints dealt with by ICs					
	IC	Jan 2012 to Dec 2013		Jan 2014 to Dec 2015	
		Received	Disposed	Received	Disposed
1	AP	18,989	16,352	NA	NA
2	ARU	322	247	NA	NA
3	ASS	2,573	1,024	5,314	312
4	BIH	48,489	15,906	NA	NA
5	CHH	5,972	6,134	8,952	5,216
6	CIC	62,723	47,662	55,834	40,328
7	Goa	746	NA	NA	NA
8	GUJ	33,270	21,555	19,721	21,027
9	HAR	10,580	11,138	16,641	16,783
10	HP	2,341	2,197	1,426	1,282
11	JHA	4,748	2,960	NA	NA
12	KAR	25,205	24,644	29,348	20,474
13	KER	7,978	5,119	8,288	2,352
14	MP	8,401	493	NA	NA
15	MAH	73,968	61,442	94,830	96,852
16	MAN	NA	NA	NA	NA
17	MEG	102	94	109	102
18	MIZ	26	21	42	42
19	NAG	73	59	62	62
20	ORI	9,822	11,710	7,621	5,030
21	PUN	12,733	12,538	14,220	13,311
22	RAJ	14,035	8,187	13,827	13,379
23	SIKK	254	254	74	74
24	TN	NA	NA	NA	NA
25	TRI	90	73	NA	NA
26	UP	74,410	73,050	67,546	81,060
27	UTT	10,016	9,406	NA	8,830
28	WB	4,938	954	4,122	1,626
Total (for the 18 ICs for which data for both years was available)		3,41,003	2,87,782	3,47,977	3,19,312

The RaaG assessment of 2014⁷⁰ found that an estimated 40 to 60 lakh (4 to 6 million) applications under the RTI Act were filed in 2011-12. Taking that as the annual estimate of number of RTI applications filed, when compared to

the number of appeals and complaints filed in a year, the data suggests that ICs are petitioned in only about 5% of the total RTI applications. However, this does not mean that in 95% of the cases people do not file appeals or complaints with the ICs because they get access to the information sought. The RaaG 2014 study⁷¹, using two different data sources, estimated that only 44% to 45% of RTI applications were successful in terms of obtaining the information requested⁷². Therefore, of the remaining 55%, less than 10% actually end up filing a second appeal or complaint.

Perhaps most of those who file RTI applications do not have the resources or skills needed to approach ICs and therefore, on not receiving the sought for information, abandon their quest. Others might get discouraged by the delays in the information commission, or even be unaware of the right to appeal.

Table V presents the per capita rate of appeals and complaints being filed annually with state ICs (excluding the CIC), calculated on the basis of the total received during the six years for which data had been compiled: 2012-13 and 2005-08. As this includes the early years, when very few applications were filed, the average would be significantly less than what the current figure is.

e) *Backlogs in ICs*

The collective backlog in the disposal of appeals and complaints in the 16 information commissions, for which data was available, was alarming as 1,87,974 cases were pending on December 31, 2015.

Even more worrying was the fact that a comparison with the data in the earlier RaaG report⁷³ on pendency. as of December 31, 2013, showed that there was a rising trend. The pendency in the Assam SIC went up by 240%, while Odisha and Punjab went up by more than 60%. The pendency in Kerala SIC went up by 49%, while the CIC saw a rise of 43% (Table VI).

The huge backlog in the disposal of appeals and complaints by the commissions is one of the most serious problems being faced by the transparency regime in India.

The high levels of pendency in ICs result in applicants having to wait for many months, even years, for their appeals and complaints to be heard, as discussed in the next section.

State	2012-13	2005-08
AP	1.1	0.6
ARU	1.2	1.1
ASS	0.4	0.1
BIH	2.3	NA
CHH	1.2	3.2
Goa	2.6	3.0
GUJ	2.8	1.2
HAR	2.1	1.2
HP	1.7	0.6
JHA	0.7	0.6
KAR	2.1	1.5
KER	1.2	1.0
MP	0.6	1.3
MAH	3.3	2.3
MAN	NA	0.6
MEG	0.2	0.3
MIZ	0.1	0.1
NAG	0.2	0.1
ORI	1.2	1.0
PUN	2.3	2.0
RAJ	1.0	0.5
SIKK	2.1	NA
TN	NA	NA
TRI	0.1	0.4
UP	1.9	2.1
UTT	5.0	2.4
WB	0.3	0.1
Average	1.8	1.1

⁷⁰ Chapter 5, Page 44, RaaG 2014, Op. Cit

⁷¹ Chapter 6, Page 63, RaaG 2014, Op. Cit

⁷² On the basis of filing and tracking more than 400 RTI application, it was found that only 45% of the various bits of information asked for were received. Urban applicants, interviewed as part of the study, claimed that only 44% of the requested information was forthcoming (Chapter 6, RaaG 2014. Op cit).

⁷³ Table 9.3, page 110, RaaG 2014, Op. Cit.

Table VI: Pending appeals/ complaints					
	IC	As of 31.12.'13	As of 31.12.'15	%age increase	Remarks
1	AP	12,456*	NA		*Year NA
2	ARU	38	NA		
3	ASS	1,378	4,684*	240%	*As of Mar '15
4	BIH		NA		
5	CHH	3,867*	5,260^	36%	*As of Dec '12 ^As of Dec '14
6	CIC	26,115	37,323*	43%	*As of 31.3.'15
7	GOA	NA	NA		
8	GUJ	8,017	NA		
9	HAR	1,537	1,395	-9%	
10	HP	205*	277^	35%	*As of Mar '13 ^As of Mar '14
11	JHA	NA	NA		
12	KAR	14,686	17,133*	17%	*As of Mar '15
13	KER	5,789*	8,614	49%	*As of Mar '13
14	MP	14,977	NA		
15	MAH	32,390	31,671*	-2%	*As of Dec '14
16	MAN	NA	NA		
17	MEG	1	8		
18	MIZ	0	NA		
19	NAG	3	0		*As of Mar '15
20	ODI	4,234	6,825	61%	
21	PUN	1,484	2,393	61%	
22	RAJ	13,538*	14,790^	9%	*As of Oct '13 ^As of Mar '15
23	SIK K	0	0*		*As of Dec '14
24	TN	NA	NA		
25	TRI	0	NA		
26	UP	48,442	48,457	0%	
27	UTT	1,076*	NA		*As of Mar '13
28	WB	8,506	9,144*	8%	*As of Dec '14
Comparable total*		1,62,175	1,87,974	*of 16 ICs which provided data of both years	

f) Time taken by ICs to dispose appeals/complaints

Using the monthly disposal rate of ICs, and the number of appeals and complaints pending, the time it would take for an appeal or complaint filed on January 1, 2016 to be heard by the IC was computed (assuming appeals and complaints were heard in a chronological order). The analysis presented in table VII shows that a matter filed on January 1, 2016 would come for hearing in the Assam state IC after 30 years - in the year 2046! In West Bengal after 11 years, and in Kerala after 7 years! The comparative data from the 2014 study is also presented in the table.

Unfortunately, the SIC of Madhya Pradesh, which had the longest waiting time of 60 years among all ICs, as per the previous RaaG report, did not provide information on its website of appeals and complaints pending and disposed as of end 2015. Therefore, it was not possible to analyse whether there has been any improvement in its functioning. In West Bengal, though, the waiting period reduced by 6 years in comparison to the 2014 data, yet as it stands at 11 years, it is still a matter of grave concern. In 9 of the 16 ICs for which data was available, the waiting time for a hearing was more than 1 year.

This is especially problematic for marginalized sections of the Indian population who use the RTI to try and access their basic entitlements like subsidized rations, old age pensions, or their minimum wages. It is a daunting

task for them to file an application seeking information, and follow this up with an appeal or complaint to the IC, in case of denial of requisite information (see box 4). If there are inordinate delays in the commissions, the law becomes meaningless for them in terms of ensuring their right to information. Further, the timeframes presented in table VII only represent the time before the appeal or complaint is

Table VII: Time taken for an appeal to be heard			
	IC	Time before new appeal is heard (as of Jan 1, 2014)	Time before new appeal is heard (as of Jan 1, 2016)
1.	ASS	2 years & 8 months	30 years
2.	WB	17 years & 10 months	11 years & 3 months
3.	KER	2 years & 3 months	7 years & 4 months
4.	ODI	9 months	2 years & 9 months
5.	RAJ	3 years & 4 months	2 years & 3 months
6.	CHH	1 year & 3 months	2 years
7.	CIC	1 year & 1 month	1 year & 10 months
8.	KAR	1 year & 2 months	1 years & 8 months
9.	UP	1 year & 4 months	1 year & 2 months
10.	MAH	1 year & 1 month	8 months
11.	HP	2 months	5 months
12.	PUN	3 months	4 months
13.	HAR	3 months	2 months
14.	MEG	No pendency	2 months
15.	NAG	1 month	no pendency
16.	SIKK	-	no pendency
17.	AP	1 year & 6 months	NA
18.	ARU	4 months	NA
19.	BIH	NA	NA
20.	GOA	NA	NA
21.	GUJ	9 months	NA
22.	JHA	NA	NA
23.	MP	60 years & 10 months	NA
24.	MAN	NA	NA
25.	MIZ	-	NA
26.	TN	NA	NA
27.	TRI	-	NA
28.	UTT	3 months	NA

Box 4: The long fight for justice

On 26/3/2012, an RTI application was filed seeking details of the status of ration cards of 8 Antyodaya ration card holders (Antyodaya ration cards are given to the poorest of the poor). The 8 ration cards had been abruptly cancelled without providing any reasons to the beneficiaries (a violation of section 4(1)(d)) and consequently, the cardholders had been denied their food entitlements for more than a year. All the ration cardholders are extremely poor and are highly dependent on their monthly entitlement of food grains for their survival. One of the ration cardholders, Sanno Devi, is a widow and is deaf and dumb.

When complete information was not received even after filing a first appeal, a second appeal was filed before the Central Information Commission on 4/7/2012. In the hearing in February 2013, the Commission ordered the department to compensate the cardholders, as the denial of timely information had resulted in the loss of their food entitlements for a year. The CIC awarded a compensation of ₹18,000 to each cardholder, which had to be paid within 5 weeks of the order.

Despite repeated follow-up, the 8 ration cardholders did not receive their compensation. In fact, the department moved the Delhi High Court in a writ petition against the order of compensation. The AAY cardholders with the help of a Sangathan fought the case. In a hearing held in the Delhi High Court on September 26, 2014, the court dismissed the petition filed by the department seeking a stay on the CIC's order and upheld the order of the CIC. However, the government even after the order of the Delhi HC refused to pay the requisite compensation. The AAY cardholders had to move a petition in court seeking implementation of the CIC order. It was only after the court intervened and ordered that the compensation be paid, that the AAY cardholders received their compensation of ₹ 18,000 each on December 22, 2015- more than three years after they had filed their original RTI application.

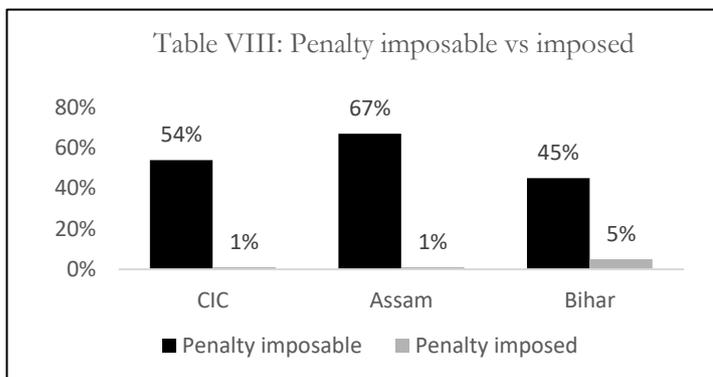
heard by the IC. Following the hearing, it would require at least a few additional days before the information is finally received by the applicant, which can be used to address the original reason for seeking information.

Perhaps one way to curb delays is to evolve an agreement on the number of cases a commissioner should be expected to deal with in a month. Given an agreement on the maximum time within which appeals and complaints should ordinarily be dealt with – hopefully not more than 45 days - the required strength of commissioners in each commission needs be assessed on an annual basis (see chapter 24 for a detailed discussion on this point).

g) Frequency of violations penalised by ICs

Across the sample of ICs (excluding Rajasthan⁷⁴), an average of 59% orders recorded one or more violations listed in Section 20 of the RTI Act, based on which the IC should have triggered the process of penalty imposition. However, in only 24% of these cases did the IC issue a notice to the PIO asking him or her to show cause why penalty should not be levied. Of the cases in which show cause notices were issued, the subsequent order which would record the final directions of the IC in terms of whether or not penalty was imposed, could only be located for 16% of the cases. Finally penalty was imposed in only 1.3% of the cases in which it was imposable. See table VIII for commission wise details of penalty imposed as opposed to penalty imposable.

As a huge proportion of the IC orders were non-speaking, or unreasoned, or otherwise deficient orders (see section 5i), the appeals and complaints that have been judged to be such that a penalty was imposable are limited to those where there was a clear case of delay, or where the IC held that the PIO had wrongly denied information. It was impossible to assess

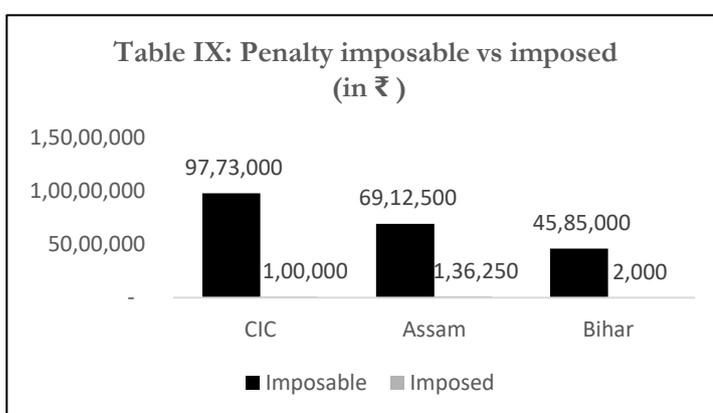


whether other violations, for instance obstruction of information or providing incorrect or misleading information (see chapter 28 for a listing of all the violations that are penalisable) existed. Therefore, the cases where penalty was imposed (1.3%), against where it was imposable, is likely to be an overestimation.

As discussed in chapter 28, in all cases where a violation of the Act has occurred, ICs must proceed with the procedure laid down in Section 20 to initiate penalty proceedings. The non-imposition of penalty has many serious implications and outcomes as it sends a message that violations of the law will not invite any adverse consequences. Chapter 28 also contains an in-depth discussion on these issues, and on the legal provisions and judicial interpretations related to penalties.

h) Loss to public exchequer in terms of penalty foregone

The analysis of 1469 orders⁷⁵ showed that by foregoing penalties in cases where it was imposable, ICs caused a loss of more than ₹ 2.10 crore (see table IX). Extrapolating this nationally, the number of appeals and complaints disposed by 18 ICs from January 2014 to December 2015 is 3,19,312. Since this figure is only for 18 ICs, even at a conservative estimate, the disposal for all ICs would be upwards of 4 lakh over the 2 year period.



⁷⁴ While the Rajasthan IC was excluded from the penalty analysis due to problems in the data, but an estimate suggests similar figures for the IC.

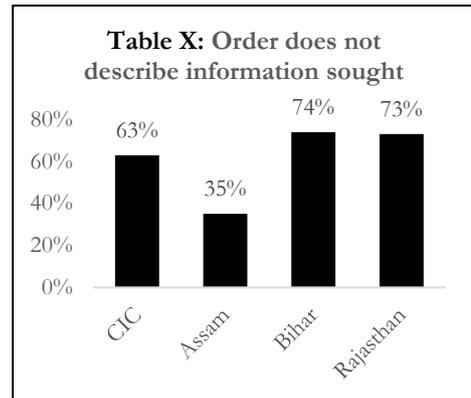
⁷⁵ Excludes Rajasthan IC due to data problems. From the remaining sample, appeals and complaints which were not adjudicated upon by ICs and were only remanded back to the PIO or FAA were also excluded for the purpose of penalty computation (see section (j)).

Therefore, the estimated annual disposal of appeals and complaints by ICs would be 2 lakh. Since in 1469 cases disposed, loss of ₹ 2.10 crore was caused, hence loss in 2 lakh cases can be estimated to be around ₹ 285 crores.

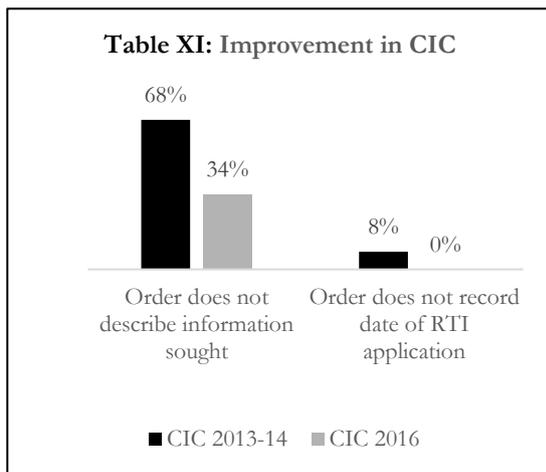
As discussed in chapter 28, non-imposition of penalty in cases of violation erodes the system of incentives and disincentives built into the RTI Act and could in fact be construed to be an offence under the IPC and other laws.

i) Deficiencies in orders

More than 60% of the orders analysed contained deficiencies in terms of not recording critical facts. Rajasthan and Bihar SICs were the worst performers with 74% and 73% of the orders respectively, not describing the information that was sought (Table X). In fact, many of the orders comprised just 2-3 lines recording only the decision of the IC, without any reference to the background or the relevant facts of the case like dates, details of information sought, decision of PIO/ FAA and the grounds for the decision of the IC and the basis thereof. See chapter 1 for a detailed discussion regarding speaking orders.



Through encouragingly, it appeared that at least the CIC had taken some corrective measures, as their performance on these parameters recorded a significant improvement between the two-time periods reviewed i.e. 2013-14 and 2016 (see table XI). A good practice from the Bihar SIC which can be emulated by other ICs is described in box 5.



Box 5: A Good Practice from Bihar SIC

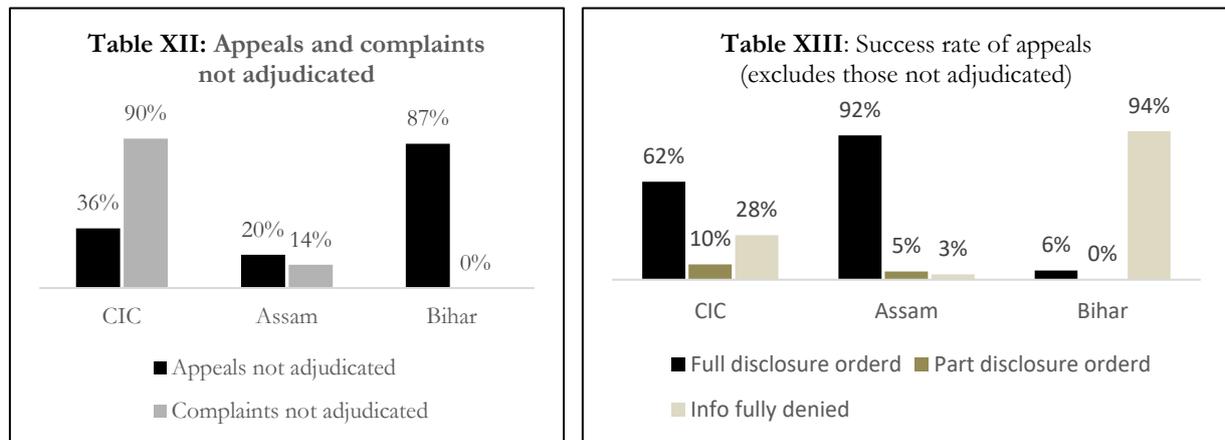
On the Bihar SIC website, apart from accessing the orders of the SIC, one can also access the original RTI application and all the correspondence/ interim-orders of the IC related to the case. In contrast, none of the other ICs evaluated as part of the study uploaded the original RTI application along with the order. Further, searching for a particular order number on the website of other ICs only retrieves that particular order and does not retrieve the related/associated orders.

However, uploading the RTI application and/or other communication, interim orders related to the order, does not do away with the need for well reasoned orders recording the relevant facts, findings, provisions of the Act, the directions of the IC and the basis thereof.

j) Success rate of appeals

Of the total cases examined across the sample of ICs, 85.5% were appeals and 14.5% complaints. 42% of all appeals were such that the IC did not adjudicate on the issue of disclosure of information as the appeal related to some other matter or the information had already been provided to the appellant before the hearing (see table XII). Similarly, 80% of all complaints were not adjudicated by ICs and most of these were remanded back to the PIO/FAA, which apart from being without a legal basis, also sets the clock back by several months and years for the complainant (see chapter 26 for a detailed discussion).

Not taking into account the appeals in which the IC did not adjudicate, on average in 70% of the appeals full disclosure was ordered, while part disclosure was ordered in 8% and in 23% information was fully denied (Table XIII). In calculating this, only that portion of the RTI application which was appealed before the IC was taken into account. For instance, if out of 10 points in an RTI application, the IC was examining only 3 points as the rest information had been provided prior to the hearing, then if the IC denied information on those 3 points, it was recorded as a full denial. Similarly, if ten bits of information had been denied but the applicant was appealing against only three of the denials, which were struck down by the IC, then this would be counted as full disclosure.



k) Orders in compliance with the RTI Act

Each of the orders was analysed to determine whether the directions given by the ICs were in keeping with the provisions of the law. From among the 252 appeals of CIC, IC Assam and IC Bihar, where part or full information was denied, 50% seemingly denied information in violation of the RTI Act, i.e. the IC denied information on grounds which are not provided for in the RTI Act. For instance, in several cases ICs denied information on the grounds that information sought was voluminous, or citing Section 7(9) of the RTI Act and claiming that the information being asked for would disproportionately divert the resources of the PA, or because the matter was sub-judice. None of these are valid legal grounds for denial of information.

The orders were also examined to determine whether the subsidiary directions regarding penalty, providing late information free of cost etc. were in keeping with the provisions of the law.

The percentage of orders in which the subsidiary directions were not in compliance with the RTI Act, was more than 65%.

l) Agenda for action

- i. There needs to emerge, through a broad consensus, agreement on the number of cases a commissioner should be expected to deal with in a month. Given an agreement on the maximum time within which appeals and complaints should ordinarily be dealt with – hopefully not more than 45 days - the required strength of commissioners in each commission can be assessed on an annual basis. The agreed to norms can also be made public, so that appellants and complainants know what to expect. Interestingly, the CIC has reportedly adopted a norm of 3200 cases per commissioner, per year. Similar norms need to be developed and followed by all state commissions, or at least those that have a pendency greater than 45 days.
- ii. There is a concomitant need to develop a consensus among information commissioners, across the country, on norms for budgets and staffing patterns of ICs, based on the number of cases to be

dealt with by each commissioner, and other relevant state specific issues. Presumably, in order to meet reasonable norms, as discussed earlier, a certain amount of support is required, and that should also be mandated as a pre-condition to the norms being followed. In the CIC many of the commissioners (perhaps all) have legal consultants, who are usually lawyers and advise commissioners on the law and the legal processes, while assisting them in the handling of matters. These are all possibilities that must be seriously explored in order to ensure that the agreed to norms are followed and pendency and delay is minimized.

- iii. In those commissions where the number of appeals and complaints are so high that even if the commissioners followed the norms related to the number of cases to be dealt with each year, they could not maintain the 45-day maximum pendency time (recommended above), there should be a provision to appoint more than the 11 ICs currently permitted under the law. In the meanwhile, wherever there is potential, additional staff should be provided to enable each commissioner to be even more productive than the norm requires. However, it must be ensured that in an effort to make haste the principles of natural justice are not compromised while disposing appeals and complaints.
- iv. Newly appointed information commissioners must be provided an opportunity to orient themselves to the law and case law. Incumbent commissioners should have an opportunity to refresh their knowledge and understanding and to discuss their experiences and thinking with commissioners from other commissions, and with experts from outside the information commissions. Towards this end, it might be desirable to link up with national institutions like the National Judicial Academy, in Bhopal, and request them to organize orientation and refresher workshops, the latter over the weekend, in order to minimize disruption of work. This is similar to the workshops being organized by them for High Court judges. Other state and national institutions could also be identified for this purpose and support could be sought from international agencies to organize regular physical and internet interactions between information commissioners in India and in other countries of the region which have similar laws.
- v. There also needs to be a standardized format for IC orders that ensures that at least the basic information about the case and the rationale for the decision is available in the order. Each order needs to be a speaking order and contain at least the date of the application; description of the information asked for; date of response, if any; nature of response; reasons given for refusal, if relevant; legal basis and rationale for the order of the commission; whether the actions of the PIO attract a penalty under any of the grounds laid down in section 20 of the Act; legal basis and grounds relied on by a commissioner if a penalty is not imposed despite existence of any of the circumstances mentioned in section 20.
- vi. Wherever a commissioner is due to demit office in the regular course of time (by way of retirement), the government must ensure that the process of appointment of new commissioners is done well in advance so that there is no gap between previous commissioner demitting office and a new one joining in.
- vii. Information commissioners across the country should get together and collectively resolve to start applying the provisions of the RTI Act more rigorously, especially those dealing with the imposition of penalties. Eleven years have passed since the Act came into effect, and this is more than enough time for the government and the PIOs to prepare themselves to implement it.
- viii. At the same time, a dialogue needs to be initiated between the public and information commissions. To that end, it is required that groups of interested citizens join hands with the media, legal professionals, and progressive former civil servants and judges, and start analyzing orders of

commissions on a regular and systematic basis, so that a meaningful dialogue can be initiated with commissions on the need and legal justification for imposition of penalties.

- ix. The commissions should maintain a detailed database of the penalties imposed by them, including the name and designation of the PIO, quantum of penalty imposed, date of imposition, time-frame within which penalty is required to be paid. This would enable Commissions to identify repeat offenders for initiation of disciplinary proceedings as per the provisions of section 20.
- x. Information commissions must also ensure that, as legally required, they submit their annual report to the Parliament/state assemblies in time. The relevant standing committees of Parliament and legislative assemblies should treat the submission of annual reports by ICs as an undertaking to the house and demand them accordingly.

PART II. ADJUDICATING DEFINITIONS

6. The definition of information [S. 2(f) & (j)]

Section 2(f) and (j) of the RTI Act:

2. In this Act, unless the context otherwise requires ---

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(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

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(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

Major Issues

Sub-sections 2(f) and 2(j), quoted above, jointly define “information” in terms of the RTI Act, thereby determining what can and what cannot be legitimately accessed under the act. After giving a very wide meaning to information, “means any material in any form”, section 2(f) also provides an indicative, but not exhaustive, list of things that would qualify to be called information. Somewhat innovatively, section 2(j) includes the right to inspect “work” and to take samples, apart from inspecting documents and records, taking notes, as a part of “right to information”.

A fairly common reason given by PIOs for rejecting requests for information has been that what was being asked for was not “information”, as defined in the RTI Act. Such a response could be justified only when applicants seek facts, opinions, data, or other such, which is not part of any record, and is neither legally nor procedurally required to be recorded.

For information with private parties, section 2(f) would require that it be procured from the concerned private parties, even if not held by or in control of the PA.

The study found there are many illegitimate denials based on a misunderstanding or wrong interpretation of the RTI Act. The most common among these are denials because the applicant was seeking reasons for decisions, actions, or inactions. Apart from denying an explicit request for reasons, PIOs have sometimes also rejected demands for “file notings”, arguing that as file notings usually contain the opinions of officials and the reasoning behind decisions, they are exempt.

There is also a surprising tendency among PIOs and information commissions to reject RTI applications which seek information in the form of a “yes” or “no” answer. In other cases, unjustified denials result from a misunderstanding of what is meant to “hold” information, or have it “under the control” of a public authority.

The statutory right of people to access information from private bodies, which can be accessed by a public authority under any other law is also not widely understood, or even known.

Two of the Supreme Court orders analysed for this study had something to say about the definition of information. In the sample of 261 high court orders under discussion, nearly 10% adjudicated on whether the “information” being asked for by the applicant in an RTI application conformed to the definition of information contained in section 2(f) of the RTI Act.

a) Accessing “reasons” as part of information

There is nothing in the RTI Act that even remotely suggests that “reasons” are exempt from disclosure. In fact, to the contrary, section 4, subsection (1)(d) explicitly obliges public authorities to proactively provide “*reasons for its administrative or quasi-judicial decisions to affected persons*”. Among other things, this further reiterates the commonly understood requirement that for every decision there must be a set of reasons, and further that these must be recorded so that they can be disclosed. And, what is statutorily mandated to be proactively provided obviously cannot be held to be exempt, or understood to be deniable, when specifically requested for by an RTI applicant.

Also, can something (in this case “reasons”) that is explicitly included as a part of the definition of information in sections mandating pro-active disclosures [section 4(1)(d)] be suddenly excluded from the definition of information, and for no reasons whatsoever, from other sections of the RTI Act.

Additionally, section 4(1)(c) obliges public authorities to proactively “*publish all relevant facts while formulating important policies or announcing the decisions which affect public.*” Clearly this would include the facts that led to the policies or decisions, and therefore be a part of, if not the whole of, the reasoning behind them.

Even the Supreme Court’s dictum, in *SC Khanapuram 2010*, that “*A judge cannot be expected to give reasons other than those that have been enumerated in the judgment or order*”, underscores the accessibility of recorded reasons under the RTI Act. In holding that you cannot access reasons “other than those” that are a part of the record, you are reiterating that you nevertheless can access reasons that are a part of the record.

Unfortunately, despite the clear and unambiguous language of the RTI Act, obliging PAs to proactively make public reasons behind policies and decisions, and no judicial pronouncements to the contrary, many PIOs continue to deny RTI applications seeking reasons for decisions, and some information commissions continue to uphold this stand.

One typical example of an illegitimate denial by a PIO, incomprehensibly upheld by the IC, is a Central Information Commission’s order that upheld the decision of the CBSE to deny information to an applicant on the grounds that under the RTI Act a public authority is not obligated to provide reasons for decisions:

“..appellant had sought information on 3 points relating to non-inclusion of Maithli language for the Central Teacher Eligibility Test.

2. PIO vide letter dt 4.10.12 informed the appellant that as per the provisions of the RTI Act, public authority is not required to provide reasons. ... in response to his appeal, he received a response from the AA in March 2013 reiterating the stand of the PIO. ...

5. The Commission sees no reason to interfere with the orders of the PIO/AA.” (CIC/000018 dated 13.08.2013)

In another case a person filed an RTI application upon being removed from her post, and in query 7 sought reasons for her removal. In its order, the CIC held that there is no obligation to provide reasons under the RTI Act-

“Further, issue no. 7 as raised by the appellant in her RTI application dated 10.09.2015, the Commission observes that the issues raised by the appellant debors Section 2(f) of the RTI Act 2005. Therefore, there is no legal obligation under which, the PIO may provide the necessary information, against issue no. 7, to the appellant.” (CIC/000424 dated 27.05.2016)

Given the fact that the RTI Act mandates the public dissemination of reasons behind decisions to all affected persons (section 4(1)(d)), and the Supreme Court recognises that all recorded reasons are accessible under the RTI Act, clearly the recording of reasons behind decisions must be mandatory. Public authorities must, therefore, take a serious view wherever reasons behind decisions are not recorded. In such cases, disciplinary proceedings should be initiated, as appropriate, and the errant officials appropriately punished. This would not only minimise the tendency to not record detailed reasons for decisions but also ensure that the non-existence of recorded reasons cannot be lightly given as an excuse for not revealing the reasons. This is also reiterated by the Supreme Court in **SC TSR Subramanian 2013**, described in section *d(iii)* below.

b) Asking the “why” question

A variation of the RTI application asking for reasons, is the application containing the “why” question. On the face of it, as the RTI Act does not exempt reasons from disclosure, there could be no justification whatsoever to hold that the question “why” is not allowed to be asked under the RTI Act. Unfortunately, the issue has got complicated because the Bombay High Court (Goa bench), in **HC-BOM Dr. Celsa Pinto 2007**, held that an RTI applicant cannot ask the question “why”. Speaking about the definition of information, as contained in section 2(f) of the RTI Act, the HC stated:

“8... The definition cannot include within its fold answers to the question why which would be the same thing as asking the reason for a justification for a particular thing. The Public Information Authorities cannot expect to communicate to the citizen the reason why a certain thing was done or not done in the sense of a justification because the citizen makes a requisition about information. Justifications are matter within the domain of adjudicating authorities and cannot properly be classified as information.”

If the HC meant that where reasons or justifications were not on record then they could not be communicated, then the HC was correct, provided that the reasons and justifications were not statutorily required to be recorded. If the reasons and justifications were on record somewhere in the PA, then they should have been provided, unless they were otherwise exempt. Alternatively, if they were required to be on record, but were not readily available, then they should have been extracted from wherever they were, and compiled, even if it meant that files would have to be reconstructed, and then provided, unless otherwise exempt from disclosure.

The last sentence in the extract reproduced above was problematic, as no reasons were given as to why the court felt that “*justifications are matter within domain of adjudicating authorities*”, and “*cannot properly be classified as information.*”

Nevertheless, being an order of the Goa bench, it was applicable at best to the state of Goa, and probably would have remained by and large unknown except in the legal community. Unfortunately, the Department of Personnel and Training (DoPT), Government of India, which is the nodal department for the implementation of the RTI Act, issued a circular on 1st June 2009⁷⁶ quoting an extract from this order, and thereby publicising this order nationally. Instead of seeking a judicial revision of this order, which would have been the correct approach, the DoPT stated in its circular that:

“The undersigned is directed to say that the High Court of Bombay at Goa in the above referred case has held on 3.4.2008 that the term ‘information’ as defined in the Right to Information Act does not include answers to the questions like ‘why’.”

⁷⁶ Circular no. No. 1/7/2009-IR, dated 1 June 2009, page 119, *Compilation of OMs & Notifications on Right to Information Act, 2005*. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training. Accessible from (last accessed on 28 May 2016): http://persmin.gov.in/DOPT/RTICorner/Compendium/COMPENDIUM_Final.pdf

No mention was made that this would not be relevant if the answer to the question why, in the form of reasons or justifications, was available as a part of the record.

They, thereby, created the enduring yet mistaken belief that PIOs under no circumstances were required to answer the question why. This was done despite the fact that the DoPT has no legal authority to issue interpretations of the RTI Act. Unfortunately, even today this circular of the DoPT continues to damage the proper implementation of the RTI Act.

Perhaps because of this, ICs continue to uphold denials based on the legally unsustainable ground of not being required to respond to the “why” question. In one such instance, an RTI application was filed with the railway department seeking information on the rules under which the railways accepted the invoices from a particular company. Instead of providing the requisite information, the PIO replied stating, “*public authority need not answer queries to the questions with prefixes such as why, what, when and whether.*” The CIC, without any discussions/reasons simply upheld the reply of the PIO stating: “*The decision of the CPIO is upheld. No further action is required to be taken at the level of Commission.*” (CIC/001591 dated 29.12.2014)

c) “File notings” as information

Another manner in which reasons are asked for under the RTI Act is by asking for “file notings”. These are sheets of paper, usually light green or light blue in colour, with a broad margin running vertically along the side of the paper. They are attached to the beginning of the file and contain a summary of the matter being considered, a mention (and links) to other relevant documents on file or placed below, and the opinions of various functionaries, moving up the hierarchy, till it reaches the decision-making authority, who records the final decision (for a historical version of a note sheet, see Box 6 below).

Disclosure of file notings has been a controversial issue, for these notings contain a record of the opinions, recommendations, and decisions of various officials dealing with the file. These are critical to understanding the reasoning behind any decision, especially in terms of how thoroughly the matter was examined and how appropriate and comprehensive were the reasons and facts on which the final decision was taken. File notings, as they contain the dated opinions of various officials, also help in fixing individual responsibility for delay and for disinformation.

Also, section 4(1)(c) of the RTI Act specifically obliges the public authority to proactively “*publish all relevant facts while formulating important policies or announcing the decisions which affect public.*”. All that file notings contain are “relevant facts”, including the views and opinions expressed by various officials and the recommendations made and decisions taken. Records containing information of the sorts that is required to be proactively disclosed cannot, as a whole, be considered exempt. Of course, for specific portions specific exemptions might apply, requiring those portions to be redacted.

Further, considering that file notings also contain opinions of concerned officials in the decision-making hierarchy, of relevance here is the Supreme Court order which holds:

“11..... the evaluated answer-book becomes a record containing the ‘opinion’ of the examiner. Therefore the evaluated answer-book is also an ‘information’ under the RTI Act.” (SC CBSE 2011)

In the same order, the SC also holds that there is no obligation to give opinions or advice that is not a part of the record and clarifies that:

“35...The reference to ‘opinion’ or ‘advice’ in the definition of ‘information’ in section 2(f) of the Act, only refers to such material available in the records of the public authority.”

It thereby confirms that where the opinions or advice sought were a part of records, then they must be considered information.

There is also a subsequent Delhi High Court order which categorically upholds the accessibility of “file notings”:

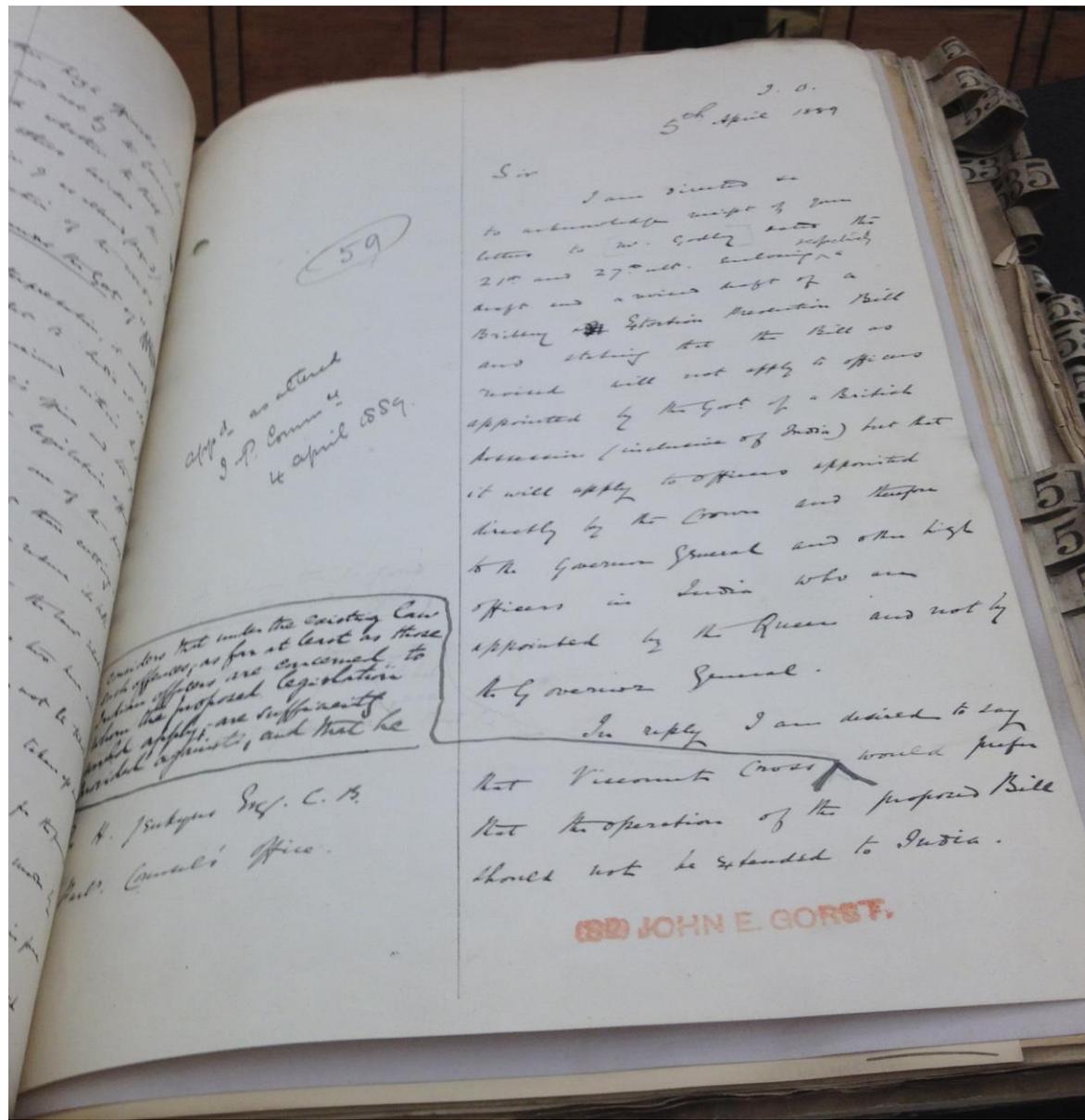
“15.3 ... there can be no doubt that file notings and opinions of the JAG branch are information, to which, a person taking recourse to the RTI Act can have access provided it is available with the concerned public authority.

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16.3 As indicated above, notes on files and opinions, to my mind, fall within the ambit of the provisions of the RTI Act....” (HC-DEL UoI Vs. Col VK Shad 2012)

Box 6: Historical “file notings”

Though the exact history of “file notings” or when they began to be called file notings is not well documented (in the early days they were also referred to as Minute Paper/Memo Sheet), they seemed to have been used by the British bureaucrats in India over a hundred years back. The file noting depicted below contains a note dated 5th April 1889, relating to a draft Bribery & Extortion Bill of the government of British India.



Interestingly, in the original draft of the RTI bill, that was sent by the National Advisory Council to the Prime Minister, in August 2004, the list in section 2(f) of specifics covered under the definition of “information” included “file notings”. This was removed before the bill was finalised and presented to

Parliament. Subsequently, the DoPT, on its official website, stated that file notings were not required to be provided in response to RTI applications.

They did this, despite the fact that even without the specific term “file noting” being mentioned in the law, the remaining language in the final law, especially the generality of “any material in any form” and the specificity of “opinions, advices”, was judged by the Central Information Commission to include file notings. Reportedly, for many months, despite the CIC’s ruling and subsequent specific directions to the DoPT, the inaccurate and misleading statement about file notings not being part of information was not removed from the web site. Legend has it that the CIC had to threaten the DoPT with direct legal action for ignoring their directions before the offending misinformation was finally taken down.

d) Information “held by” or “under the control of” a PA

There has been much dispute about what qualifies under the RTI Act to be information “held by” or “under the control of” a public authority, and thereby accessible under this act. Underlying such disputes are essentially one or more of three types of reasons. First, the belief that the RTI Act does not require public authorities to compile or collect information that they might not have readily available. Second, that they are not obliged to give out information that they just happen to have but are not required, under law or rules, to hold. And, third, that they are not obliged to supply information that has been supplied by another public authority and is primarily held, or primarily under the control of, that other public authority.

i) Providing information required to be held: There is an obligation on a public authority to provide information under the RTI Act that the public authority is mandated to hold or collect under any law, rules, or orders and instructions (subject to exemptions under section 8). Otherwise, PAs might just stop maintaining information that was embarrassing or incriminating, or at least claim that they did not have it, even where they are required to collect it.

This matter was considered by the Supreme Court and they said (emphasis added):

“35...But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant...” (SC CBSE 2011)

From this, it follows that - where such information is required to be maintained under any law or the rules or regulations of the public authority - then there is an obligation upon the public authority to collect or collate such information and furnish it to an applicant.

ii) Providing information incidentally held: In fact, the obligation to provide information does not stop with information that a public authority is legally or otherwise obliged to maintain. It further covers even other information that the authority might not be required to maintain legally, or because of rules or regulations, but nevertheless maintains or holds.

Clarifying the obligations of a public authority, in terms of what can be considered as information that is subject to access under the RTI Act, in *HC-BOM Kausa Educational and Charitable Trust 2013*, the Bombay High Court, quoting *HC-DEL Secretary General, Supreme Court of India 2010*, has reiterated that the terms ‘held’ or ‘control’ must be understood in their widest sense when applied to information and that the obligation of a public authority to provide information does not end with information that is statutorily required to be ‘held’ by the public authority, but by all information that is “used”, “received”, or “retained” by the public authority.

“8. Full Bench of the Delhi High Court in MANU/DE/0013/2010 : AIR 2010 Delhi 159-”(Secretary General, Supreme Court of India Vs. Subhash Chandra Agarwal, has observed:-

“61. The words 'held by' or 'under the control of' under section 2(j) will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority in the course of its functions and its official capacity. There are any number of examples where there is no legal obligation to provide information to public authorities, but where such information is provided, the same would be accessible under the Act. For example, registration of births, deaths, marriages, applications for election photo identity cards, ration cards, pan cards etc. The interpretation of the word 'held' suggested by the learned Attorney General, if accepted, would render the right to information totally ineffective.”” (HC-BOM **Kausa Educational and Charitable Trust 2013**)

iii) **Recording all orders:** It is becoming increasingly common for PIOs and PAs to state that no written orders or reasons are available for decisions and that therefore the information being asked for is not being held by the public authority. Of relevance here is an order of the Supreme Court where, in **SC TSR Subramanian 2013**, the Supreme Court has held that as democracy requires a well-informed public and, consequently, the RTI Act provides a right to information, therefore all verbal and oral instructions must be subsequently recorded, otherwise they could not be provided to an applicant under the RTI Act. By acting on oral instructions without recording them, not only would the objectives of the RTI Act be defeated, but favouritism and corruption would be supported:

“34. Democracy requires an informed citizenry and transparency of information. Right to Information Act, 2005 (RTI Act) recognizes the right of the citizen to secure access to information under the control of public authority, in order to promote transparency and accountability in the working of every public authority. Section 3 of the Act confers right to information to all citizens and a corresponding obligation under Section 4 on every public authority to maintain the records so that the information sought for can be provided. Oral and verbal instructions, if not recorded, could not be provided. By acting on oral directions, not recording the same, the rights guaranteed to the citizens under the Right to Information Act, could be defeated. The practice of giving oral directions/instructions by the administrative superiors, political executive etc. would defeat the object and purpose of RTI Act and would give room for favoritism and corruption.”

The Supreme Court goes on to direct that within three months all states and union territories would issue directions like Rule 3(3) of the All India Services (Conduct) Rules, 1968⁷⁷, quoted below.

“3(3) (i) No member of the Service shall, in the performance of his official duties, or in the exercise of powers conferred on him, act otherwise than in his own best judgment to be true and correct except when he is acting under the direction of his official superior.

(ii) The direction of the official superior shall ordinarily be in writing. Where the issue of oral direction becomes unavoidable, the official superior shall confirm it in writing immediately thereafter.

(iii) A member of the Service who has received oral direction from his official superior shall seek confirmation of the same in writing, as early as possible and in such case, it shall be the duty of the official superior to confirm the direction in writing.”

e) *Information from private bodies*

Perhaps one of the most significant, but rarely used, provision of the RTI Act, which empowers people to access information about any private body, is unobtrusively hidden in the last few words of section 2(f). These last few words essentially empower members of the public to use all the statutory powers available with the government to access “information relating to any private body which can be accessed by a public authority under any other law for the time being in force”.

⁷⁷ http://ipr.ias.nic.in/Docs/AIS_ConductRules1968.pdf accessed on 2nd June, 2016

The government has also not promulgated any rules/guidelines to operationalise this section in terms of enumerating the categories of information about private bodies that can be accessed by public authorities, and the details of the laws under which these can be accessed.

It is relevant to point out that this section is not limited to such information which a private body is required to statutorily submit to a PA, as that would, in any case, be information held by a PA. It includes all such categories of information which a PA can access under any other law. The wide coverage of this provision becomes obvious when it is recognised that there is little information relating to any private body that is of public interest and the government cannot access under some law or the other.

This is because, as a general principle, any issue impacting public interest is invariably subject to government regulation. Whatever the government is authorised to regulate, it is *ipso facto* authorised to enquire into and seek information about. In fact, many laws contain general, cover-all, provisions authorising the government to access any information that it might desire.

This provision providing public access to information held by private bodies is neither widely known nor understood by the public. Even public authorities and the private sector are mostly unaware of the implications of this provision. Fortunately, there have been some progressive orders of the Supreme Court and the high courts which directly and indirectly support public access to private information.

In **SC RBI 2015** the Supreme Court held that information collected by a public authority from private parties was information under section 2(f) of the RTI Act and accessible to the public under this act. Specifically, the SC held that information collected by the Reserve Bank of India (RBI) even from private banks, as a part of the RBI's statutory responsibility to inspect and regulate the banks in India, qualified to be information such that it could be accessed under the RTI Act:

“66. Furthermore, the RTI Act Under Section 2(f) clearly provides that the inspection reports, documents etc. fall under the purview of "Information" which is obtained by the public authority (RBI) from a private body.....

67. From reading of the above section it can be inferred that the Legislature's intent was to make available to the general public such information which had been obtained by the public authorities from the private body. Had it been the case where only information related to public authorities was to be provided, the Legislature would not have included the word "private body". As in this case, the RBI is liable to provide information regarding inspection report and other documents to the general public.” (SC RBI 2015)

The SC further held that if the information collected was such that it was not in itself exempt, and could be collected by another public authority under some other law, then it would be accessible to the public, using section 2(f) of the RTI Act, from a private body through another public authority. If this was so, then no purpose would be served by the RBI relying on other exemptions, like fiduciary relationship, to refuse access.

“68. Even if we were to consider that RBI and the Financial Institutions shared a "Fiduciary Relationship", Section 2(f) would still make the information shared between them to be accessible by the public. The facts reveal that Banks are trying to cover up their underhand actions, they are even more liable to be subjected to public scrutiny.” (SC RBI 2015)

In **SC Thallapalm 2013** the Supreme Court specified that all information that could be accessed by a public authority from a private party, under any law, could be considered as information “held” by that public authority. Equally important, the Supreme Court further laid down that even if a particular public authority (in this case the registrar) could not statutorily access some information from a private body, but if some other public authority could access it statutorily, then the private body (in this case a society) would have to provide that information.

Presumably section 6(3) of the RTI Act would oblige the original public authority to transfer any RTI application seeking such information from a private body to the public authority which has the statutory power to access this information from the concerned private body. The SC rightly reiterated that the further

provision of this information to the applicant would of course be subject to the exemptions under the RTI Act.

The SC goes on to specifically state that the concerned PA can “gather” information from the private body, to the extent that the law permits. This would clearly imply that even if the information sought was not available with the PA, the PA was obliged to procure or “gather” it.

“52...Registrar can also, to the extent law permits, gather information from a Society, on which he has supervisory or administrative control under the Cooperative Societies Act. Consequently, apart from the information as is available to him, under Section 2(f), he can also gather those information from the Society, to the extent permitted by law.....Apart from the Registrar of Co-operative Societies, there may be other public authorities who can access information from a Cooperative Bank of a private account maintained by a member of Society under law, in the event of which, in a given situation, the society will have to part with that information...” (SC Thallapalm 2013)

The Bombay and Kerala High Courts both held that, in fact, a public authority is obliged under the RTI Act to access the requested information from a private party if there was any provision of any law under which it could do this. In **HC-BOM Rajeshwar Majoor Kamgari Sahakari Sanstha Limited 2011**, the HC clarified that all public authorities were obliged, under the RTI Act, to access and provide information that they could access under any other law from a private body.

“9. It is required to be noted that the State Information Commissioner after accepting the position that the Petitioner Society is not a "public Authority" has taken into consideration the definition of "information" as provided for in Section 2(f) of the said Act.

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“Perusal of the said definition discloses that any information relating to any private body, which can be accessed by the Public Authority under any other law for the time being would come within the ambit of "information" as provided for in the said Act. In the instant case, the information was sought from the Assistant Registrar of the Cooperative Societies, who is admittedly a public Authority within the meaning of the said Act. ...The State Information Commissioner, therefore, considering the said definition of "information" was within his rights to direct the Assistant Registrar, who is a Public Authority, to provide the said information by having recourse to his powers under the Maharashtra Cooperative Societies Act, 1960, thereby what has been done is that the information, which the Assistant Registrar can statutorily access, has been directed to be provided to the Applicant.

“10. The fact that the information is in respect of a private Body would make no difference as the direction is to a Public Authority and it is precisely to cover such a situation that the Legislature thought it fit to provide for a wider definition of the term "information". The submission of the learned Counsel for the Petitioner that what could not have been done directly, is sought to be done indirectly, therefore, can only be stated to be rejected as the Assistant Registrar is obliged to provide the said information as a public Authority exercising powers under the Maharashtra Cooperative Societies Act, 1960. The contention of the learned Counsel for the Petitioner, therefore, that since Petitioner is not a public Authority, no information can be sought to be provided by the Assistant Registrar cannot be accepted...”

A similar point was made by the HC in **HC-KER Mulloor Co-operative Society Ltd. 2012**.

2. What we notice from the definition clause of "information" itself is that information that is required to be supplied under the RTI Act can even be information relating to any "private body" which can be accessed by a "public authority" under any other law for the time being in force .. When these authorities constituted under the KCS Act answer the description of "public authorities", they are bound to furnish information to any applicant if it is within their knowledge or otherwise, they should in exercise of their statutory powers access such information from the society and furnish it to the applicant. Therefore, even if society by itself does not answer the description of "public authority", the statutory authorities under the KCS Act being public authorities within the meaning of Clause (c) of Section 2(b), are bound to furnish information after accessing the same from the co-operative society concerned.”

Unfortunately, despite strong and clear pronouncements by the judiciary, PIOs and even information commissions continue to reject requests for information from private bodies, without even examining the question whether such information is accessible to any PA under any other law. In one such case, of an RTI applicant seeking information from the CBSE relating to a private school, the Central Information Commission ruled:

“Vide RTI dt 20.4.13, appellant had sought information on 5 points relating to DPS Jodhpur... PIO RO CBSE, Ajmer, vide letter dt 29.4.13, informed the appellant that the information sought was not available with them... Written submission dt 24.1.14 from Regional Director, CBSE Ajmer is received and taken on record. DPS Jodhpur vide their letter dt 24.1.14, have informed the RO that they are not a public authority and hence do not come within the purview of the RTI Act... The Commission concurs with the decision of the PIO/AA.” (CIC/ 001159 dated 27.01.2014)

No effort seems to have been made in this case by the CIC to determine whether the information sought from the private school was such that it could be accessed by some public authority under any of the applicable laws.

In a matter before the Assam SIC, the applicant filed an RTI Application to the Deputy Inspector of Schools (DIS), Silchar, Cachar, seeking information about a particular school, namely, Aton Babu V.L.P. School. During the hearing of the matter, the PA submitted that the RTI application had been transferred to the said school and the school Headmaster had furnished certain information. The applicant challenged the veracity of the information, however, the Commission dismissed the matter by recording that *“as the institution in question is a venture one without financial assistance from the Government, the Headmaster of the School may not constitute a Public Authority and the furnishing of information by him pertaining to the school will have to be voluntary.”*

As the RTI application had been filed to the DIS and not the school, it was immaterial whether the school was a PA or not. Rather than dismissing the matter, the IC should have examined whether the DIS was statutorily empowered to access the information sought in the RTI application from the school and accordingly ordered information disclosure as per section 2(f) of the RTI Act. (***SIC/ASS/CCR.54 dated 15.02.2016***)

f) “Yes” or “no” answers as information

Recently, it has become fashionable for public authorities to reject RTI applications seeking a “yes” or “no” response. It is true that one cannot seek unrecorded opinions or conclusions, therefore where such is being sought, it deserves rejection. However, suppose one was to ask whether the Prime Minister of India had made an official visit to the USA in December 2015, this is a legitimate question which could easily and correctly be answered by a “yes” or “no”. Clearly there would be records of whether the PM had gone to the USA or not in the indicated month. And, if the PIO wanted to be safe, she could respond by saying that there was nothing on record that indicated that such a trip was made, or that there was a record of such a trip being undertaken.

After all, the same information could be elicited, especially if the PM had not done the trip, by requesting for a copy of the PMs itinerary, in which case the PIO would have to respond saying that no such visit is on record. Therefore, an application ought not to be rejected just because it seeks a “yes” or “no” answer, especially where the answer being sought is about a matter of fact, or about a recorded opinion or assessment.

This kind of denial, based on the language used in the application to seek information, has no basis in law. In fact, given the levels of illiteracy and lack of access to quality education for the majority of the population in India, emphasising the language used in the RTI application and making that a ground for

denial is discriminatory. The role of the PIO, as envisaged under the RTI Act, is to provide assistance to persons seeking information and facilitate them in the process. Section 5(3) of the Act states:

“(3) Every Central Public Information Officer or State Public Information Officer, as the case may be, shall deal with requests from persons seeking information and render reasonable assistance to the persons seeking such information.”

Therefore, when dealing with such RTI applications, instead of adopting a blanket policy of denying information, the PIO should provide any record which could fully or partly answer the questions being raised. For example, if someone asked “Are there prescribed minimum wages for Delhi?” or “Is there a scheme for providing housing to the poor?”, a legitimate and reasonable response would be to identify the documents related to minimum wages in Delhi, and housing schemes for the poor, and provide those documents. If no minimum wages were prescribed or no such scheme existed, then the PIO was obligated to say so or, at the very least, say that there was nothing on record to indicate their existence. If the application is seeking information which is not exempt under the RTI Act, then there is no legitimate reason for denying it, just because it is inelegantly worded.

Perhaps PIOs and ICs should be encouraged to treat each RTI application that seems to seek a yes or no answer as being paraphrased with ‘please provide information on’ before the operative part. This would convert the question “Are there a prescribed minimum wages for Delhi?” to “please provide information on prescribed minimum wages for Delhi”.

In many cases, information may be sought in a query form which would enable citizens to meaningfully exercise their right to information. For instance, if an applicant queries a public authority whether particular records are maintained by it or not, such information must be provided, as knowing what records are maintained by a PA is the basis for accessing information under the RTI Act. In fact, in recognition of this, the RTI Act makes it incumbent on PAs to proactively disclose details of records and documents held by a PA-

“4. (1) Every public authority shall—

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b) publish within one hundred and twenty days from the enactment of this Act,—

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(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

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(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;”

Only those RTI applications that seek a yes or no answer which cannot be determined from any existing record, or which seeks the opinions or advice of the PIO, for example: “According to you, is the poverty line appropriate for Delhi?”, are not maintainable under the RTI Act.

At least the Andhra Pradesh High Court explicitly recognises the legitimacy of a “yes” or “no” answer by holding that such a query is legitimate:

“17. For instance, whether or not, any orders have been passed, on an application for grant of a licence can be sought as an information. In case any order has been passed, the PIO would be under obligation to furnish the copy of the order. On the other hand, if no order was passed on the application, information can be furnished to the same effect.” (HC-AP Divakar S. Natarajan 2009)

Unfortunately, PIOs and even some ICs continue to deny information if the information sought is worded in query form in the RTI application rather than as requests for information. In fact, in an order the CIC cited its own order of 2006 in which it held:

“It is not open to an appellant to ask, in the guise of seeking information, questions to the public authorities about the nature and quality of their actions. The RTI Act does not cast on the public authority any obligation to answer queries, as in this case in which a petitioner attempts to elicit answers to his questions with prefixes, such as, why, what, when and whether. In view of the fact that the request if the petitioner is not clearly defined in terms of section 2(f) of the RTI Act, 2005, we have no option but to reject his appeal”. (CIC/00045 - dated 21.04. 2006).

g) Agenda for action

- i. The DoPT should send out a detailed circular bringing to the notice of all PIOs and PAs the judicial rulings relating to the definition of information, but without attempting to interpret such rulings.
- ii. Wherever supportive Supreme Court or high court orders relevant to an application exist, and whenever possible, RTI applicants should cite them in their applications and appeals, so that their requests are honoured or, subsequently, the PIOs, FAAs and ICs become liable to contempt citations.
- iii. Each PA must publish and regularly update a list of the laws, including the specific sections, under which they can access information from a private body, and a list of the private bodies from which information can be so accessed.
- iv. All the appropriate governments and competent authorities must make rules relating to the access of information by PAs from private bodies, as envisaged in section 2(f) of the RTI Act. These rules must spell out what is required from the RTI applicant, what is expected of the PA, and what are the processes to be followed by the private body. Or, better still, a single set of rules should be made and decreed by Parliament to be applicable all over India.

7. Defining public authorities [S. 2(h)]

Section 2(h) of the RTI Act:

- (h) "public authority" means any authority or body or institution of self-government established or constituted—*
- (a) by or under the Constitution;*
 - (b) by any other law made by Parliament;*
 - (c) by any other law made by State Legislature;*
 - (d) by notification issued or order made by the appropriate Government,*
- and includes any—*
- (i) body owned, controlled or substantially financed;*
 - (ii) non-Government organisation substantially financed,*
- directly or indirectly by funds provided by the appropriate Government;*

Major Issues

Control and substantial financing are the two most disputed qualifications for a body to be declared a public authority. Considering main-stream government agencies are clearly public authorities, the dispute is mostly about private bodies, autonomous bodies, NGOs or cooperative societies. Two SC orders, and over 10% of the HC orders under discussion dealt with this question. The issues raised were similar before the SC and the HC. They were mainly focussed on substantial funding and control. There was also the question of whether being created by a statute is the same as being governed by one. The question whether constitutional authorities or competent authorities are public authorities, was also litigated.

a) Constituted or created by law

On the face of it, the law is very clear in specifying that any authority, or body, or institution that is constituted by law made by Parliament, or a state legislature, is a public authority. But some confusion has crept in while distinguishing between institutions that are constituted “by law” or constituted “under a law”. Typically, cooperative societies, or registered NGOs, or even corporates, are constituted or set up “under a law”, specifically the Cooperative Societies Act, 1912, the Societies Registration Act, 1860, or the Companies Act, 2013. Does this by itself make them public authorities?

The judicial consensus that has emerged is that just because a body is set up under a law, and regulated by it, does not by itself make it a public authority. Otherwise, all corporates, NGOs, cooperatives, and many other institutions besides these, would become public authorities. The Supreme Court, and at least one High Court, have held that such bodies can only be considered public authorities under the RTI Act if they are either owned, controlled, or substantially financed, by the government.

The Supreme Court, in **SC Thallapallam 2013**, rightly distinguished between a body that was created by a statute and that which was merely regulated by a statute, and held that while the former would be a public authority, the latter not so at least in terms of being ‘established or constituted by law’. This seems unexceptionable. Specifically, the SC said:

“15. We can, therefore, draw a clear distinction between a body which is created by a Statute and a body which, after having come into existence, is governed in accordance with the provisions of a Statute. Societies, with which we are concerned, fall under the later category that is governed by the Societies Act and are not statutory bodies, but only body corporate within the meaning of Section 9 of the Kerala Cooperative Societies Act having perpetual succession and common seal and hence have the power to hold property, enter into contract, institute and defend suites and other legal proceedings

and to do all things necessary for the purpose, for which it was constituted. Section 27 of the Societies Act categorically states that the final authority of a society vests in the general body of its members and every society is managed by the managing committee constituted in terms of the bye-laws as provided under Section 28 of the Societies Act. Final authority so far as such types of Societies are concerned, as Statute says, is the general body and not the Registrar of Cooperative Societies or State Government.”

In **HC-P&H Chandigarh University 2013**, the Punjab and Haryana High Court held that all bodies established under a legislation were not consequently public authorities, otherwise every company registered under the company’s act would be a public authority.

“6. ... The legislature had made a conscious distinction between "by or under" which is used in relation to the Constitution and "by" in relation to a Central or State Legislation. As such, it would not be enough for the body to be established under "a Central or State legislation to become a "public authority". If this be so, then every Company registered under the Companies Act would be a "public authority". However, this is not the case here. Admittedly, the petitioner-University is a body established by law made by the State Legislature. Clearly, the petitioner would be covered under the scope and ambit of the definition of "public authority" under Section 2(b)(c) of the RTI Act.

7. The requirement as regards a body being owned, controlled or substantially financed would only apply to the latter part of Section 2(b) of the RTI Act i.e. body falling within the meaning of Section 2(b)(d)(i) or (ii). Once it is shown that a body has been constituted by an enactment of the State Legislature, then nothing more need be shown to demonstrate that such a body is a "public authority" within the meaning of Section 2(b)(c) of the RTI Act.”

b) Substantially financed

Another, perhaps even more controversial, criterion for being classified as a public authority is if an institution, body, etc. is substantially financed, directly or indirectly, by the government. The RTI Act does not define “substantial” and neither does there appear to be a generally accepted definition. NGOs and other private bodies seem mostly keen not to be classified as public authorities and vigorously argue that the finances they receive, even if they run into lakhs of rupees, are not substantial.

Unfortunately, despite being frequently disputed, there is yet no clear definition of “substantial financing” that has emerged from the adjudicators. In **SC Thallapallam 2013** the SC made some observations about substantial funding and related matters, that need further discussion.

While examining whether the co-operative societies under consideration were substantially funded by the government, the SC seemed to have, almost in passing, suggested a possible definition of “substantial funding”. The SC appeared to suggest that funding can only be considered substantial if the recipient body would struggle to exist without it. It went on to illustrate this by suggesting that funding to the extent of about 95% of the body’s budget could be an instance of substantial funding.

“38. Merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to existBut, there are instances, where private educational institutions getting ninety five per cent grant-in-aid from the appropriate government, may answer the definition of public authority under Section 2(b)(d)(i).” (SC Thallapallam 2013)

There are at least three seeming difficulties with this definition and illustration. First, it appears to interpret the term “substantial” in a manner that is not its common understanding. In the preceding paragraph of the same order the SC quotes various definitions of the word substantial:

“37. ... In Black's Law Dictionary (6th Edn.), the word 'substantial' is defined as 'of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real: not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.' The word 'substantially' has been defined to mean 'essentially; without material qualification;

in the main; in substance; materially.' In the Shorter Oxford English Dictionary (5th Edn.), the word 'substantial' means 'of ample or considerable amount of size; sizeable, fairly large; having solid worth or value, of real significance; sold; weighty; important, worthwhile; of an act, measure etc. having force or effect, effective, thorough.' The word 'substantially' has been defined to mean 'in substance; as a substantial thing or being; essentially, intrinsically.' Therefore the word 'substantial' is not synonymous with 'dominant' or 'majority'. It is closer to 'material' or 'important' or 'of considerable value.' 'Substantially' is closer to 'essentially'. Both words can signify varying degrees depending on the context."

The SC then proceeds to adopt, without any explanation or justification, a definition that is significantly more stringent and restrictive than all those that were quoted.

Second, there is a certain vagueness about the language used which, given that it is a part of an SC order, could well foster hundreds of hours of debates and much litigation in the years to come. Take for example the requirement that funding could be termed as substantial only if the funding “.. *was so substantial to the body which practically runs by such funding.*”. What would be proof of that?

Suppose the employees said that they would cut size, or work honorary, or cut salaries if this funding was not there, but that their organisation could well run without it, then would that take the body out of the purview of the RTI Act. What about a claim that alternate funds were available if this grant disappeared, or that there were endowment funds that could be tapped?

The third issue is about some of the unintended impacts of such an interpretation of “substantial funding”. It would, for example, exempt large and corporate (or foreign funded) NGOs from the purview of the RTI Act, even if they received hundreds of crores of rupees in government funding, as long as they were able to raise a small percentage (six percent as per the illustration by the SC) of that amount from non-government sources, or establish that they could survive without government funds, they would not have to worry about public accountability. Clearly this could not be the intent of Parliament, or of the Supreme Court.

Perhaps a preferred definition of substantial funding, keeping in mind the objectives of the RTI Act, could be that any support, in cash or kind, to a private organisation such that by the rules of audit it would be subject to audit by the government, would be considered “substantial funding” for the purposes of the RTI Act. This would be relatively unambiguous, widely inclusive, and serve the dual objectives of both making those receiving public funds, and those meant to regulate such funds, answerable to the people.

There was support for such a view in at least two High Court orders. The Punjab and Haryana HC contrasted “substantial” with “trivial”:

*“76. Taken in the context of public larger interest, the funds which the Government deal with, are public funds. They belong to the people. In that eventuality, wherever public funds are provided, the word "substantially financed" cannot possibly be interpreted in narrow and limited terms of mathematical, calculation and percentage (%). Wherever the public funds are provided, the word "substantial" has to be construed in contradistinction to the word "trivial" and where the funding is not trivial to be ignored as pittance, then to me, the same would amount to substantial funding coming from the public funds. Therefore, whatever benefit flows to the petitioner-institutions in the form of share capital contribution or subsidy, land or any other direct or indirect funding from different fiscal provisions for fee, duty, tax etc. as depicted hereinabove would amount to substantial finance by the funds provided directly or indirectly by the appropriate Government for the purpose of RTI Act in this behalf.” (HC-P&H **The Hindu Urban Cooperative Bank Ltd. 2011**)*

The Madras High Court stated that it was not necessary to get into the details of the funds being received, for where a body was receiving government grants and performing public functions, then it must be treated like a public authority, without bothering about the quantum of funds being received. This order provides an interesting contrast to **SC Thallapalam 2013**, discussed above.

“28. In the light of the above, this Court is not inclined to accept the submissions of the learned Senior Counsel for the petitioner that the Colleges is not substantially financed to come within the purview of the Act. In a given case, if the College denies admission to a meritorious student, for any reason, and if the College denies to part with the information for such denial, citing that it is not a public authority, then such meritorious student, cannot be compelled to approach the Court of law, bereft of any fact, as to why, the admission was denied.

29. Again, in a given case, if any College, receiving aid from the Government, indulges in mismanagement of the fund or commits any financial irregularities of such fund, any public interested person, can seek for information, as to how the grant-in-aid is spent. If the College receives any concession from the Government or receives a grant or sanction for disbursement of fee concession to any under privileged person and if the same is not fully paid or partly paid, then the aggrieved student or any person, with a probona interest can seek for information.

30. Once public money is paid to the College for the purpose of imparting education and when public policies towards implementation of achieving social justice is sought to be enforced in any educational institution, by the State, then it is incumbent on the educational authorities, to implement the same and that no college can be permitted to take a defence that it does not come within the purview of the Act, and that the Public Information Officer cannot issue any direction to the College to disclose any information to the applicant. Such a stand would be defeat the very purpose and object of the Act.

31. As rightly contended by the learned counsel for the 2nd respondent, it is not open to the College, to compare their whole expenditure, to that of the quantum of aid, granted by the Government on the ground that it is less and therefore, on that ground to contend that there is substantial funding and hence, the College does not come within the purview of the Act. This Court is of the view that the quantum of grant does not always decide the applicability of the provisions of RTI Act, to an educational institution or any other body established or constituted, (a) by or under the constitution; (b) by any other law made by Parliament; (c) by any other law made by the State Legislature; (d) by any notification issued or order made by the appropriate Government, and includes any, (i) body owned, controlled or substantially financed; and (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government, but it should be referable to the activity carried on by such entities, involving public interest and public duty, which includes an educational institution.

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“36. Reverting back to the case on hand, certainly, the expenditure for payment of fees for the staff engaged in conducting unaided courses has to be incurred by the College. Therefore, it may be not substantial for the entire expenditure incurred by the College. But that does not mean that the College, which has engaged in public function of imparting education, controlled by the educational authorities, has no duty to part with any information to the Public, relating to such activity. Collection of fees by the educational authorities is regulated by the Government under a duly constituted committee and therefore, a student or a parent or anybody, who is interested in the welfare of the students and in matters, relating to implementation of public policies and orders of the Government, particularly in the matter of fee structure, is entitled to seek for details from the College and he cannot be termed as a busy body to meddle with the functions of a College. The word, "substantial" in the Right to Information Act has been interpreted to mean, "practical and as far as possible" and not a higher percentage of the grant or otherwise. As stated supra, the estimated expenditure of the petitioner-college is likely to be more, when the college conducts courses unaided by the Government. But the petitioner-College cannot deny the fact that the amounts received by way of grant, represent the salary to the teaching and other staff, engaged in the aided courses and also of the fact that professional engineering colleges are also permitted to collect developmental charges by AICTE for the infrastructure provided by them to the students. In a given case, if the fee collected by the College is not in accordance with Government guidelines or for that matter, if there is any mismanagement of the funds granted to the College, the information sought for is required to be furnished in "public interest", ...” (HC-MAD The Registrar, **Thiyagrajar College of Engineering 2013**)

Meanwhile, organisations keep coming up with imaginative reasons for wriggling out of their obligations under the RTI Act and ICs sometimes fall into the trap of allowing them to do so. One typical case is described below.

A person filed a complaint to the CIC contending that The Church of South India Trust Association be declared a public authority as it received funding from four state governments and also from foreign sources. However, the complainant was unable to provide evidence of such support but cited that financial statements circulated by the Church stated: “*Since the Financial Statements are being prepared incorporating all units and sub units accounts for first time and owing to the vast geographical presence of the company, the management is in the process of collection financial records in the form of returns from all the subunits which is not complete as on 31st March 2013.*” The CIC, instead of taking serious note of the lack of compliance with fiscal statutory norms, held:

“In view of the wording as embedded above, it is not clear as to whether the particular trust (under which the association has been functioning) is being substantially financed or even simply financed by the appropriate Government (i.e. either State Government or Central Government), as defined under section 2(h) (d)(ii) of the RTI Act 2005 or not.”
(CIC/000050 dated 18.05.2015).

Such an approach by the CIC would encourage bodies to circumvent the RTI Act by not complying with fiscal norms and not reporting details of their funding. In the absence of reporting on funding and income details, it would be impossible for any person to make the case for a body to be a public authority under the RTI Act as it is substantially funded by the government.

The problem is compounded by the fact that, in violation of section 4 of the RTI Act, PAs do not provide a comprehensive list giving details of funds disbursed to non-government bodies (NGOs and corporates) which would to a large extent help clarify the issue of which bodies are substantially financed.

c) Controlled by the government

There are at least three types of scenarios in which organisations which are not a part of the government are, nevertheless, controlled by it. In many cases, ministries and departments of the government set up non-governmental bodies to implement certain programmes and perform certain functions, as by being outside the traditional setup of government these bodies have a certain freedom and flexibility that allows them to function better. However, the government often retains control through one or more of many methods. A common method is to include in the constitution that some members and the head of the governing body would be public servants in an ex-officio capacity.

Second, even where a non-official body has not been set up by the government and is not receiving substantial public funds, where it needs government permission to operate or is legally subject to close government supervision, it is often required to, or voluntarily opts to, include government officials into its managing body.

Third, in some cases officials, especially high-ranking ones, are invited to be presidents, or chairpersons, of various non-governmental bodies in an ex-officio capacity, in order to add to the prestige of such bodies, heighten their respectability and acceptance, and facilitate interaction with the government.

Where officials are members of managing bodies of non-government organisations, in their individual capacity, then their presence would clearly not tantamount to “official control” of that non-official body. But what happens when officials become ex-officio members of such committees, in their official capacity? And the membership is not a matter of choice for them, but a part of their official duties. Does it then amount to control by the government?

Perhaps the critical question here is whether they are still free to make, as ex-officio members, whatever decisions they want to, or support whatever action or policy they think fit, or are they bound to follow government instructions and conform to government policy. In short, when they hold such appointments,

as a part of their official position, are they representing the government in the committee? This is especially important for even when they are in a minority of one, the fact that they are from the government often gives them significant influence in decision making, and occasionally even an informal veto power.

A similar set of concerns seemed to have been in the mind of the Supreme Court when, in **SC Thallapalam 2013**, it held that it was not enough that a body was controlled by the government in order to qualify as a public authority, it must be “substantially” controlled:

“34. We are of the opinion that when we test the meaning of expression “controlled” which figures in between the words “body owned” and “substantially financed”, the control by the appropriate government must be a control of a substantial nature. The mere ‘supervision’ or ‘regulation’ as such by a statute or otherwise of a body would not make that body a “public authority” within the meaning of Section 2(h)(d)(i) of the RTI Act. In other words just like a body owned or body substantially financed by the appropriate government, the control of the body by the appropriate government would also be substantial and not merely supervisory or regulatory.” (Emphasis added)

These were also some of the issues before the Delhi High Court which were dealt with in **HC-DEL Army Welfare Housing Organisation 2013**. It was argued that despite senior army officers being, ex-officio, on the management board of the Army Welfare Housing Organisation, the organisation was not controlled by the government and therefore not a public authority.

“10. The reason which has prevailed with the CIC and the learned Single Judge, to hold the appellant to be a public authority within the meaning of Section 2(h) of the RTI Act, is that the Board of Management of the appellant comprises of serving officers of Army and the Army Headquarters thus having power to decide the members thereof and exercising control over it through the said Army Officers...There can be no dispute with the factual position of, the Board of Management of the appellant comprising of serving Army officers and that the Army Headquarters thus, by deciding whom to post to the office, occupier whereof becomes ex-officio member of Board of Management of the appellant, can indeed choose who will and who will not be a member of Board of Management of the appellant. Thus, we, in this appeal are to only adjudge the correctness of the said sole reason given by the learned Single Judge.

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14... Though the persons occupying the position in the Board of Management of the appellant are serving Army officials who in performance of their duties as such officers are required to act as per the dictates of the Army Headquarters or the Ministry of Defence but the same cannot lead to the presumption that they, in their capacity/ position as members of the Board of Management of the appellant will also act as per the dictates of the Army Headquarters or the Ministry of Defence. Thus it cannot be said that for this reason the Board of Management of the appellant is under the control of Army Headquarters or the Ministry of Defence. Such persons, as members of the Board of Management of the appellant are expected to exercise their functions in accordance with the Charter of the appellant, honestly and reasonably.

In the case of a public servant, as for example the various army officers in the case under consideration, they all remain subordinate to the Chief of Army Staff and the Defence Ministry, and are bound to follow all legal orders of these various authorities given to them in their official capacities, in which they are on the managing board of the concerned organisation. For example, if the Defence Minister and the Army HQ decided that war widows should be allotted housing on a priority basis, would it be open to the army officers who are members of the managing committee, in their official capacity, to vote against this in the managing committee meeting (especially if they were ordered to support it)?

In an earlier order, the Delhi High Court seemed to have taken a somewhat different stand. In **HC-DEL Delhi Integrated Multi Model Transit System Ltd 2012** the HC maintained that the presence of even non-executive government directors would tantamount to government control, as would shareholding by the government.

“46. In view of the aforementioned provisions, it is abundantly clear that the GNCTD (being a shareholder to the extent of 50%; and comprising half of the Board of Directors) exercises substantial control over the petitioner company. The

above clauses leave no manner of doubt that the GNCTD, while divesting its 50% stake in the petitioner company, continued to retain the right to keep itself abreast with all the on-goings in the company, and the right to have its say and to influence the decision making process in all important matters of the company. While the day to day management may have been vested with the officers/Directors nominated by the IDFC - so as to bring about a professional management, firstly, they are responsible and answerable to the GNCTD/ their nominee directors and, secondly, the overall supervision and control is retained equally by the GNCTD. In the eventuality of a showdown, the GNCTD has the last word.

47. The argument of the petitioner that the Directors nominated by the GNCTD are non-executive Directors, whereas those nominated by the IDFC are executive or functional directors - is neither here nor there. Merely because the Directors nominated by the GNCTD on the Board of Directors of the petitioner company are nonexecutive Directors, it does not mean that they have no role to play, or responsibility to share, in the decision making process of the Board. They are entitled to, and do participate in the Board meetings and are entitled to raise issues and even obstruct or oppose any move proposed by the Directors nominated by IDFC, if they are so instructed by the GNCTD, or if they are of the opinion that the same may not be in the overall interest of the company, or of the shareholder GNCTD - whom they represent on the Board of the petitioner company. They perform a higher duty of participating in policy making, and, therefore, discharge a higher responsibility than the routine and mundane day-to-day tasks, which are left to be performed by others. Mere lack of day-to-day responsibility on the shoulders of the nominee Directors of GNCTD does not dilute their powers, responsibilities and privileges as Directors of the petitioner company.

48. The term "controlled" is to be interpreted liberally keeping in view the object of the Act. If the interpretation advanced by the petitioner to the term "control" were to be adopted, it would defeat the purpose of the Act. What is required to be seen is: whether by virtue of the constitution of the body, the appropriate government is in a position to regulate, or exercise power or influence over the affairs of the body. If so, as in the present case, then the body in question is deemed to be "controlled" by the appropriate government for the purposes of the Act.

49. For the aforesaid reasons, the submission of the petitioner that in the absence of more than 50% stake in the petitioner company or the absence of day-to-day management control of the petitioner company by the GNCTD, the latter could not be held to be in "control" of the petitioner company- also has no merit. Even otherwise, this submission of the petitioner is untenable in view of the definition of the term "control" as found in the SHA, which reads as under: "Control" shall mean with respect to any Person, the ability to direct the management or policies of such Person, directly or indirectly, whether through the ownership of shares or other securities, by contract or otherwise, provided that in all event the direct or indirect ownership of or the power to direct the vote of fifty percent (50%) or more of the voting share capital of a Person or the power to control the composition of the board of directors of a Person shall be deemed to constitute control of that Person (the expressions "Controlling" and "controlled" shall have the corresponding meanings)

50. It is clear from the said definition that power to control the composition of the Board of Directors shall be deemed to constitute control. In the present case, it is not in dispute that the half of the Board of Directors shall be nominated by the GNCTD and, as such, it controls the composition of the Board. Consequently, the petitioner company is "controlled" by the GNCTD.

In **HC-ORI North Eastern Electricity Supply Company of Orissa Ltd. 2009** the HC gave a 49% equity holding of the government, plus the fact that the company was discharging an essential public duty, as reasons to hold that the company was a public authority. As this order suggests that a body is a public authority if it performs a public function, it introduces a new definition of "public authority". Though such a definition seems beyond the purview of the RTI Act at present, it might well be indicating an important future trend.

"12. In the present case, admittedly the Petitioner company is a subsidiary of GRIDCO, which is a wholly owned Government company, which holds 49% equity in the 4 distribution companies, including the Petitioner company, who are engaged in distribution & supply of electricity in different parts of Orissa under licences granted to them by the OERG, as per the 1998 Rules... Furthermore, the Petitioner company as well as the other 3 distribution companies

execute different schemes sponsored by the Central & the State Government, the funds of which are provided by the appropriate Government... Moreover, the 4 distribution companies, including the Petitioner company are discharging governmental functions of distribution & supply of electricity to the people of the State, which is an essential public duty, All these go to show that the State Government has a deep & pervasive control over all the 4 distribution companies including the Petitioner & such control is not mere regulatory.

13. In view of the above, we are of the considered opinion that the Petitioner company is a "public authority" ... holding that the Petitioner company falls within the definition of "public authority" as defined in the RTI Act..."

Essentially the RTI Act empowers people to seek information from those private bodies that in one way or another the government controls. If we understand the RTI Act to be aimed at allowing public accountability for government action, then where a body is controlled by the government its actions become in effect governmental actions and are subject to public accountability. However, defining what would tantamount to control is not always easy. Given the earlier stated objective of the RTI Act, perhaps what could be said is that wherever government control over a private body is such that the government can determine, not just influence, what the body does or how it acts, then in such a case public accountability becomes critical and the RTI Act should apply.

Though it is desirable, as has been argued by the Orissa High Court quoted above, that any private body that performs an essential public duty should be considered a public authority, this does extend the definition of a PA as it is generally understood. Perhaps an interpretation of the definition, through a definitive SC order, would do the trick. Incidentally, transparency laws of at least some other countries explicitly bring under its purview 'all persons, juristic persons, and partnerships, that have carried out or are carrying out any trade, business, or profession', as in the South African *Promotion of Access to Information Act, 2000*,⁷⁸ which includes in its jurisdiction:

"a natural person who carries or has carried on any trade, business or profession, but only in such capacity; a partnership which carries or has carried on any trade, business or profession; or any former or existing juristic person..."

d) Competent authorities as public authorities

Responding to the query of whether competent authorities under the RTI Act can also be public authorities, the Bombay High Court gave a categorical response. In *HC-BOMPIO 2011* the HC held that the governor of a state was a public authority and that there was no contradiction in the governor being both a competent authority and a public authority.

"16. It is true that the President and the Governor have been specifically included in the definition of "competent authority". But the mere fact that the President and the Governor are authorities mentioned in sub-clauses (iv) of section 2(e) of the RTI Act, would not exclude them from the definition of "public authority". If any of the authorities mentioned in clauses (i) to (v) of section 2(e) which defines "competent authority" also fall within any of the clauses (a) to (d) of the definition of "public authority" those persons/authorities would both be the "competent authority" as well as the "public authority". The expressions "competent authority" and "public authority" are not mutually exclusive. The competent authorities and one or more of them may also be the public authorities. Similarly the public authorities or some of them, like the President and the Governor who are the "public authority", may also be the "competent authority". Overlapping is not prohibited either by the RTI Act or by any other law.

17. We are fortified in our view by a decision of the Special Bench (of Three Judges) of Delhi High Court, rendered in Secretary General, Supreme Court of India vs. Subhash Chandra Agarwal, (L.P.A. No. 501/2009 decided on 12th January, 2010). In that case, the Chief Justice of India (who is the "competent authority" under section 2(e)(ii) of the

⁷⁸ For further details, see: <https://www.ucl.ac.uk/constitution-unit/research/foi/countries/south-africa>

RTI Act) was also held to be the "public authority". The fact that the Chief Justice of India (for short "the CJI") was the competent authority did not deter the Court from coming to the conclusion that he was the "public authority" under section 2(h) of the RTI Act."

e) Agenda for action

- i. Perhaps "substantial funding" should be defined as funding that attracts the provisions of an audit (mandatory or optional) by the government, under the relevant rules or laws. Either the Supreme Court should be moved to this end, as Parliament did not define what it meant by "substantial", or the Parliament should accordingly amend the RTI Act.
- ii. Each public authority that provides funds to private bodies should be required to publicly list and regularly update the names and addresses of the bodies that are being funded, along with the amount and purpose for which funding is being provided. Apart from promoting general transparency, such a list would help the public to identify those bodies which are receiving substantial funding and are therefore public authorities.
- iii. Every private body should list the names and official positions of the government officials as ex-officio members on its governing, executive, or management committees or boards, or in any other position where they have an influence on the affairs of the body. This would help members of the public to determine the level of government control over the body.
- iv. Correspondingly, every public authority should proactively disclose the names of those of their officials who serve in an ex-officio capacity on the committees and boards of any private or non-government organisation, along with details of their role.
- v. The definition of a public authority should include all those private bodies that are performing an essential public duty. There is already a high court order interpreting "public authority" to include all such, and being in keeping with the spirit of the RTI Act, perhaps what is needed is a definitive SC order for it to be actualised.

8. Access to the RTI Act [S. 3]

Section 3 of the RTI Act:

“3. Subject to the provisions of this Act, all citizens shall have the right to information.”

Major Issues

This seemingly straightforward section of the RTI Act has thrown up at least two issues: first, regarding who can apply for information under the RTI Act, and second whether only a single “citizen” can apply, or can it be a group of “citizens”.

a) By citizens or persons

For various reasons, the question whether only citizens or any person can apply for information under the RTI Act, is a vexed one. For one, many of the transparency laws across the world do not restrict applicability to just citizens of the country. The transparency laws of the USA, UK, Canada, and many others allow non-citizens to access information.

The parliamentary discussions on the RTI bill suggest that there was a fear among parliamentarians that if the RTI Act was not restricted to citizens, people hostile to India could misuse it to access information which could be used to the detriment of the country. But we would require something stronger, like the exemptions listed under section 8(1), especially 8(1)(a), to ensure that information, whose disclosure was detrimental to the interests of India, did not become public. The restricting of the RTI Act to citizens would not realistically help achieve this objective. Besides, it can be argued that as foreigners are subject to the laws of India, they should have a right to access information about actions and decisions which affect them, at the very least during their stay in India.

Also, the decisions and policies of India, especially given its stature as one of the largest countries in the world, with among the fastest growing economies, and a huge military power, affect much of the world and especially the South Asian region. Therefore, perhaps India owes to the world, as a growing world power, a modicum of transparency.

There are also practical problems in implementing section 3. For one, section 6(2) of the RTI Act specifies that *“An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.”* Therefore, how does the public authority establish that the applicant is a citizen?

Even more confounding is the fact that a large majority of the Indian population does not have documentary proof of citizenship. Many have no birth certificates, no passports, and even though large numbers might now have an *Aadhar* (identity number), but this is not accepted as proof of citizenship.⁷⁹ Then how does one expect a majority of the Indian people, mostly the poor and marginalized, to prove their citizenship in order to exercise their fundamental right to information.

Finally, in the areas bordering or neighbouring other countries, specifically Pakistan, Sri Lanka, Bangladesh, Myanmar, and China, there are many cases where the citizenship of residents is itself under question and they often resort to the RTI Act to get the documents and records required to establish their Indian citizenship. What would be their status, if section 3 was strictly applied?

Interestingly, the Supreme Court, in *SC CIC Manipur 2011*, has observed that whereas section 3 talks about citizens, section 6 refers to persons, thereby the application of section 6, under which information is accessed, is wider.

⁷⁹ source: https://uidai.gov.in/beta/images/handbook_verifier_6122013.pdf

“25...It is quite interesting to note that even though under Section 3 of the Act right of all citizens, to receive information, is statutorily recognised but Section 6 gives the said right to any person.

“Therefore, Section 6, in a sense, is wider in its ambit than Section 3.”

Overall, there seems to be no good reason to restrict the use of the RTI Act to just citizens, especially in a country where a vast majority of the population has no documentary proof of citizenship and where some of the poorest and marginalised segments of the society have their citizenship questioned, often for political expediency.

b) By individuals and groups

Though there seems to be no bar to multiple signatures on a single RTI application, especially after a ruling to the effect by the Central Information Commission (*CIC/ 001429 dated 16.07.2010*), there is still some confusion on whether applications can be made by office holders of organisations, such as NGOs, in their capacity as office bearers. The CIC, in the earlier cited order, held that while organisations were juridical “persons”, they were not citizens, and as such could not access information through the RTI Act. However, in light of the observation of the SC quoted above (*SC CIC Manipur 2011*), perhaps even “persons” should be eligible to use the RTI Act needs to be rethought.

Sporting multiple signatures on RTI applications is also a strategy followed by poor and marginalised groups of people to protect themselves from repercussions, especially when they want to seek information that might ruffle the feathers of powerful vested interests. Applying for information as a group makes them feel less vulnerable than if they applied singly. It also becomes more difficult for vested interests to threaten and brow beat a group. Given the Indian reality where RTI applicants continue to be threatened and brow beaten, occasionally physically beaten up, and sometimes even killed, this is a consideration that must be kept in mind.

In *HC-P&H Ved Parkash 2012*, the Punjab and Haryana High Court holds that where two or more citizens join hands, they do not lose their identity as citizens. The HC further points out that Section 13 of the General Clauses Act, 1897 specifies that ordinarily singular would include plural. Besides, the HC holds that allowing applications with two or more signatures would prevent unnecessary multiplicity of applications, where more than one person is seeking the same information:

“8. In the present case, it is not in dispute that the petitioners, who had filed application before the authority under the Act, were born in India after commencement of the Constitution. They had filed a joint application seeking certain information. The question is as to whether their application/appeal could be rejected on the ground that they being group of individuals cannot be termed as citizens? Three individuals, who had filed the application before the Public Information Officer or the appeal before the Commission, have not constituted any separate legal entity, as a consequence of which they have lost their individual status. It has not become a legal entity in itself, as may be in case of constitution of a company, which has separate legal entity. It was held by Hon'ble the Supreme Court in N. Khadervali Sabeel (Dead) by LRs and another v. N. Gudu Sabib (Dead) and others, MANU/SC/0088/2003 : (2003) 3 S.C.C. 229 that even a partnership firm does not have an independent entity, though in that case some individuals by signing a document termed as partnership deed join together to carry on some business or other activity giving such an entity a different name. Name of the firm is only a compendious name given to the partnership and the partners are the real owners of entire property of the partnership. Relevant paragraph thereof is extracted below:

“.....A partnership firm is not an independent legal entity, the partners are the real owners of the assets of the partnership firm. Actually, the firm name is only a compendious name given to the partnership for the sake of convenience. The assets of the partnership belong to and are owned by the partners of the firm. So long as partnership continues each partner is interested in all the assets of the partnership firm as each partner is owner of the assets to the extent of his share in the partnership. On dissolution of the partnership firm, accounts are settled amongst the

partners and the assets of the partnership are distributed amongst the partners as per their respective shares in the partnership firm. Thus, on dissolution of a partnership firm, the allotment of assets to individual partners is not a case of transfer of any assets of the firm.

The assets which herein before belonged to each partner, will after dissolution of the firm stand allotted to the partners individually.””

“9. Section 13 of the General Clauses Act, 1897 clearly provides that in all Central Acts and Regulations, unless there is anything repugnant in the subject or context, words in the singular shall include the plural and vice versa. In the present case, it cannot be denied that the appellants before the Commission individually being citizens of India were entitled to invoke the jurisdiction of the authorities under the Act for seeking information. Merely because more than one citizen had sought information by filing a joint application when their cause of action is same, it cannot be rejected holding that the same was filed by group of persons. The ultimate object is to avoid multiplicity. In case more than one individual can file separate application for same relief, they can always file a joint application.”

c) By persons from across the country

The RTI Act does not restrict any one from applying for information anywhere in the country. Therefore, you could be living in one state or part of the country and could apply for information from another state or part. In fact, an Indian living anywhere in the world could ask for information from anywhere in India, through the Indian embassy in their country of residence or through the online RTI portal (for the Central government).

However, this free flow of information is seriously hampered by the fact that there are a large number of rules under the RTI Act, a different one for each state, and for each competent authority, that you need to access, read, understand and then use to apply for information from different public authorities.

As per sections 27 of the RTI Act, each of the “appropriate governments” are empowered to make rules in relation to the RTI Act. Section 2(a) of the RTI Act further defines an appropriate government to be the central government and the state governments. Section 28 of the RTI Act also empowers “competent authorities” to formulate their own rules for implementing the RTI Act. Section 2(e) defines competent authorities to mean:

“(i) the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;

(ii) the Chief Justice of India in the case of the Supreme Court;

(iii) the Chief Justice of the High Court in the case of a High Court;

(iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;

(v) the administrator appointed under article 239 of the Constitution;”

Apart from the fact that this allows for the co-existence of over a hundred set of rules, it also makes it essential for a potential seeker of information to know the rules applicable to the specific public authority from which the information is sought. This is particularly a problem because the law allows people from any state to apply for information from any other state, and from their own state, from any high court or state legislative assembly, and from the Central Government, the Parliament, the Supreme Court and all of the union territories, each of which can have, and often do have, their own rules that are binding for information held by each, and distinct from the other. And where the information is being sought from PAs under multiple “appropriate governments” and “competent authorities”, it becomes truly a herculean task.

Consider an organization trying to help homeless children or help women in distress across the country, which is seeking information regarding institutions that are involved at the local level with such work. They cannot just file an RTI application with each state government or union territory government. They would

first have to access the rules relating to each of these 36 governments, plus the Central Government, and pay the different fees and through different methods, and also in some cases provide specific documentation. In case they were also seeking copies of high court orders relating to destitute women and abandoned children, they would have to access and study another 24 sets of rules, and so on.

The problem gets aggravated when governments and competent authorities make rules that are directly in violation of provisions of the RTI Act, like the Government of Orissa demanding, of all RTI applicants, proof of citizenship despite section 6(2) which, among other things, specifies that:

“An applicant making request for information shall not be required to give ... any other personal details except those that may be necessary for contacting him.”

Even more problematic is where the scope of the law, or of any specific provision of the law, is expanded or restricted beyond what is laid down in the law. Unfortunately, various other states including Goa, Gujarat, and Sikkim also have such rules.⁸⁰

It is unclear why the government opted for a system where everyone makes their own rules. This is perhaps appropriate and even necessary where the use of the law is restricted to within each state and the relevant conditions in each state differ, making it impossible to have national uniform rules or norms. An example of this is the Minimum Wages Act 1948 which, though a national act, allows each state to fix its own minimum wages as the cost of living varies drastically from state to state.

However, for the RTI Act there are no such state level or institutional variations and, as such, a uniform set of rules across the country would have made life easier for the general public.

d) Agenda for action

- i. The RTI Act must be accessible to all persons, irrespective of their citizenship.
- ii. Till this happens, in order to ensure that even Indians, in large numbers, are not prevented from exercising their fundamental right to information because they do not possess documentary proof of their citizenship, the relevant provision of the RTI Act should be enforced by commissions and courts to prohibit PAs and commissions from seeking documentary proof of citizenship along with RTI applications or appeals.
- iii. The Parliament should consider decreeing that there should be a single set of rules across the country for the RTI Act, equally applicable to all public authorities.

⁸⁰ RaaG & CES 2014 Op. Cit, page 128

PART III. ACCESSING & DISSEMINATING INFORMATION

9. Proactive disclosures [S. 4]

Section 4 of the RTI Act:

“4(1) Every public authority shall—

a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;

b) publish within one hundred and twenty days from the enactment of this Act,—

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(ix) a directory of its officers and employees;

(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorisations granted by it;

(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers;

(xvii) such other information as may be prescribed; and thereafter update these publications every year;

c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

d) provide reasons for its administrative or quasi-judicial decisions to affected persons.”

(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.

(3) For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.

(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority."

Major Issues

Section 4(1) is one of the most critical sections of the RTI Act. Sub-section 4(1)(a) exhorts the PA to computerise its records, thereby not only facilitating proactive disclosure but also making it easier to service requests for information. Section 4(1)(b) obliges public authorities to proactively publish various categories of information and make them readily accessible to the public. It lists 16 categories of information that should be proactively disclosed and also leaves open the possibility, vide clause 4(1)(b)(xvii), to add more categories of information that should be proactively disclosed.

Section 4(1)(c) supplements section 4(1)(b), and adds at least three important obligations for proactive disclosure. First, it obliges the proactive disclosure of "*all relevant facts*" relating to policies and decisions "*which affect the public*". Second, it stipulates that they will be published "*while formulating important policies*" and, third, that they will also be published while "*announcing the decisions which affect public*".

The first obligation binds public authorities to proactively publish all relevant facts. Considering that information which is required to be published proactively cannot be such that it is as a category exempt from disclosure under the RTI Act, one important outcome of this statutory obligation is that, by implication, it also establishes that relevant facts relating to policies and decisions affecting the public are categories of information that are not exempt from disclosure. Of course, specific facts could still be withheld if they attracted any one of the listed exemptions.

Proactive disclosure of such information enables the public to judge whether all relevant facts were taken into consideration while formulating policies or deciding on matters. It also allows the public to assess whether what was claimed to be a fact was actually so, or did the truth lie somewhere else. And, most importantly, it allows the public to judge whether the facts that were considered relevant, actually supported the policy formulated, or decision taken, or were there other facts which, if considered, might have led to a different outcome.

The second obligation to publish facts while formulating policies sets the stage for meeting a longstanding demand of the people of India: to have a system of pre-legislative consultations. Prior to the RTI Act, there appeared to be no statutory requirement to consult the people while formulating policy, or even keep them informed about the process. The RTI Act has created at least the obligation of keeping them informed of all relevant facts "*while formulating policy*" and, by implication, while formulating laws, programmes, schemes, and even budgets, all of which are methods by which government policy is implemented.

Though the RTI Act does not explicitly provide for consultations, as this is beyond its mandate, by insisting that the public be kept informed during the process of formulating a policy, it ensures that the public is at least alerted on what is being proposed, and why, and can thereby choose to raise their voices and intervene in the process.

In some senses, the third obligation completes the cycle but is also wider than the second, for it requires public authorities to publish all relevant facts while "*announcing decisions*" that affect the public. The term

“decision” is much wider than the term “policy”, for public authorities decide on policy, but also on many other things besides policy. This not only obliges public authorities to proactively publish the relevant facts that led to the adoption of any one particular policy, but also to share the facts relevant to all other decisions that affect the public.

Therefore, even if the public authority decides, after deliberations, not to formulate policy on a particular issue, or not to change existing policy, the public authority is obliged to proactively inform the public of the relevant facts behind these decisions, whenever these decisions become public.

Section 4(1)(d) complements and, in a sense, goes beyond section 4(1)(c). At first look it might appear that (d) is narrower and more restrictive than (c), for whereas (c) covers the public at large, (d) restricts its focus to “affected persons”. In actual fact, it broadens the scope of what needs to be proactively disclosed. For even if an administrative or quasi-judicial decision affects one person or a few people and therefore cannot be considered to affect public and would not get covered under 4(1)(c), the reasoning still has to be proactively shared with the “affected persons” under 4(1)(d).

Further, where a decision affects the public in general, then the reasoning has to be proactively shared with every one, as they all become “affected persons”. In any case, (d) obliges public authorities to proactively share reasons, and not just the relevant facts, as required in (c). This creates the additional obligation of recording the reasons behind all its administrative and quasi-judicial decisions, including information commission decisions. And these decisions and the reasons behind them must be proactively disseminated to all affected persons.

Consequently, all public authorities must ensure that either in the document recording the decision, or elsewhere, the reasons for the decision are recorded so that they can be proactively shared and also provided in response to RTI queries. This has also been reiterated by the Supreme Court.

Sections 4(2) and 4(3) provide supportive directions for proactive dissemination, and 4(4) casts an obligation on the public authority to, among other things, disseminate the relevant materials in the local language.

Though the importance of proactive disclosures has generally been recognised, there is occasional disagreement on what needs to be proactively disclosed and in what form. There is also some legal confusion on how to enforce provisions of proactive disclosure and whether information once proactively disclosed can still be requested through an RTI application. There is also a reiteration that mostly information should be provided or disseminated in the local language, if that is what is requested.

a) Importance of proactive disclosures

It can be argued that, in an ideal world, all the information that might be required or wanted by the public, would be available proactively, in a manner such that it could be easily, quickly and efficiently searched and accessed. This would also go a long way in helping the poor and marginalised, who might not have the linguistic ability or the financial resources to file an RTI application and pursue it through the various appellate stages.

It would also be in keeping with the vision that ultimately there would be very few applications needed to be filed, and the RTI Act would “wither away” as a reactive law, primarily manifesting itself as a proactive law and providing information before you could ask for it, perhaps even before you become aware that you need it, or that it exists. This is articulated in Section 4(2) of the Act which states “*It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.*” (emphasis added).

Only information that is either private or otherwise seemingly exempt from disclosure would still necessitate the filing of an RTI application. This would not only minimise the work pressure on public authorities but also ensure that records, because they are now in the public domain, cannot be subsequently manipulated or maliciously misplaced or lost. Also, it would educate the public about many issues that, without such proactive transparency, they might not even be aware of. The fact that all information would be proactively made public would act as an effective deterrent to wrongdoing, making it much harder for people to live in the hope nobody would become aware of their aberrations. It would also provide anonymity to the information seeker and thereby make them less vulnerable to the wrath of vested interests.

Admittedly, given the fact that currently less than 25% of the Indian population⁸¹ have access to internet, and many people are still who illiterate or semi-literate, disseminating information widely would be a significant challenge.

The importance of *suo moto* disclosures was recognised by the Supreme Court which, in **SC CBSE 2011**, categorised information into three types and put the information enumerated in section 4(1)(b) & (c) of the RTI Act as belonging to the first category which promoted transparency and accountability.

*“31. The effect of the provisions and scheme of the RTI Act is to divide ‘information’ into the three categories. They are : (i) Information which promotes transparency and accountability in the working of every public authority, disclosure of which may also help in containing or discouraging corruption (enumerated in clauses (b) and (c) of section 4(1) of RTI Act). (ii) Other information held by public authority (that is all information other than those falling under clauses (b) and (c) of section 4(1) of RTI Act). (iii) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force. Information under the third category does not fall within the scope of RTI Act. Section 3 of RTI Act gives every citizen, the right to ‘information’ held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon public authorities to *suo moto* publish and disseminate such information so that they will be easily and readily accessible to the public without any need to access them by having recourse to section 6 of RTI Act...”*

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“37. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption.”

Along similar lines, the High Court of Uttarakhand stressed the importance of proactive disclosure and stated that it was wrongly believed that information must be provided only when asked for. In fact, the need of the day is proactive disclosure of all relevant information.

*“20. It is a common misconception prevailing even today that information must be given to citizens only when it is asked. This is not the case. Most of the information has to be given by the public authority, *suo motu*, under Section 4 of the Act which has to be periodically updated by various means of communications, including internet so that the public should have a minimum resort to the use of this Act for obtaining information. In other words the endeavour of the public authority should be such that the information should be readily available to citizens by available means of communication, including internet and the other means so that they may not have to request for information under Section 6 of the Act.” (HC-UTT State Consumer Disputes Redressal Commission 2010)*

In many senses, section 4 is perhaps the most important part of the RTI Act, and certainly seems to reflect the future direction that the transparency regime in India must take. In a country the size of India, universal proactive disclosures can be the only way forward, for if a billion plus Indians were forced to file

⁸¹ <http:// ASSOCHAM.ORG/NEWSDETAIL.PHP?ID=6109>

RTI applications each month in order to ensure access to information related to even their most fundamental rights, the whole system would sooner or later collapse.-

Also, the poor and marginalized, who are the most dependent on government services (and therefore need information the most) do not always have the requisite resources to file RTI applications and follow up with appeals, where they don't get the information sought. In order to ensure that they have access to information, effective implementation of Section 4 is a must.

b) Categories of information to be proactively disclosed

Though section 4(1)(b) has a comprehensive list of the types of information that should be disclosed proactively, slowly but surely this list is being added to and new types of information are being prescribed to be proactively disclosed. One interesting order, to this end, was given by the Delhi High Court. The High Court held that information relating to public money donated by the President of India, using his discretionary powers, should be in the public domain and should, in fact, be disclosed proactively.

“9. The submission of Mr. Chandibok that the learned CIC has confused donations with subsidy is not correct. The CIC has consciously noted that donations are being made by the President from the public fund. It is this feature which has led the learned CIC to observe that donations from out of public fund cannot be treated differently from subsidy given by the Government to the citizens under various welfare schemes. It cannot be said that the CIC has misunderstood donations as subsidies. The relevant extract from the order of the CIC reads as follows:-

“We do not find the decision of the CPIO in conformity with the provisions of the RTI Act. In fact, every public authority is mandated under Section 4 (1) (b) (xii) of the RTI Act to publish on its own the details of the beneficiaries of any kind of subsidy given by the government. The donations given by the President of India out of the public funds cannot be treated differently from the subsidy given by the government given to the citizens under various welfare schemes. The people of India have a right to know about such donations. Some minimum details, such as, the names of the receivers of the donations, their address and the amount of donation in each case should be published from time to time in the website of the President Secretariat itself. Therefore, we not only direct the CPIO to provide this information to the Appellant within 15 working days of receiving this order, we also direct him to take steps to publish such details in the website of the President Secretariat at the earliest.” (emphasis added)

“For all the aforesaid reasons, I find no merit in this petition and dismiss the same. The interim order stands vacated.”
(HC-DEL President's Secretariat 2012)

c) Methods of dissemination

Section 4 of the RTI Act doesn't just detail the categories of information that need to be proactively provided, but also the methods by which the information must be disseminated. This is an area where advances in modern technology, especially the ability to digitize data, to upload it on websites and to access it through personal computers and through cell phones, has opened up a new range of possibilities, albeit for a small but growing section of the population.

Section 4(3) states that *“...every information shall be disseminated widely and in such form and manner which is easily accessible to the public”*, and section 4(4) states that *“all materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format...”*

Therefore, Section 4 requires information to be disclosed not just through the internet, but also, through non-electronic means of communication, including notice boards, newspapers, public announcements, and wall paintings, in the local language. This is especially important in a country like ours where, as earlier mentioned, less than 25% of the population is estimated to have access to the internet. In fact, in the RTI Act the word “disseminated” even includes inspection of offices of any public authority.

d) Penalising or compensating for “proactive disclosure” violations

Despite the criticality of section 4(1), the RTI Act does not explicitly prescribe any penalties for violations. This is a pity, for a recent survey done by RaaG indicated that the obligations of public authorities under various clauses of section 4(1), especially clauses 4(1)(b), (c) & (d), are more honoured in the breach.

Compliance with provisions of section 4(1)(b) were audited as a part of the 2014 RaaG study. The audit showed that in 65% of the PA premises inspected, no board displaying details of the PIO, fee, timings etc. could be found⁸². An audit undertaken by the National Campaign for Peoples’ Right to Information (NCPRI) in October 2015, of compliance with provisions of section 4(1)(b) by the Prime Minister’s Office (PMO), and the Chief Minister’s Offices (CMOs) of various states, similarly showed poor compliance. The audit found that the website of the PMO did not have the mandatory disclosures required under section 4(1)(b) of the RTI Act. Only twenty states had a dedicated website for the CMO, of which only 5 States had proactive disclosures mandated under Section 4(1)(b) of the RTI Act on the website⁸³.

The record of most public authorities in meeting their obligations under these sections is abysmal. This has perhaps resulted in the fact that nearly 70% of the total RTI applications filed in India⁸⁴, estimated to be upwards of 40 lakh (4 million) per year, ask for information that should have been proactively disseminated. If there was better compliance with provisions of section 4, then more than half the applications being filed would not need to be filed.

i) Penalising violations of section 4

To some extent this legal lacuna can be made up by a robust application of the powers given to information commissions under section 19(8)(b). In **SC CBSE 2011** the SC has unequivocally stated that the commission has the power to require PAs to comply with provisions of section 4(1)(a), (b) and (c) and proactively put out the specified information.

“36. Section 19(8) of RTI Act has entrusted the Central/ State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of section 19(8) refers to six specific powers, to implement the provision of the Act.

Sub-clause ... (iii) empowers the Commission to require a public authority to publish certain information or categories of information. This is to secure compliance with section 4(1) and (2) of RTI Act. The power under section 19(8) of the Act is intended to be used by the Commissions to ensure compliance with the Act, ... to ensure that the information enumerated in clauses (b) and (c) of sections 4(1) of the Act are published and disseminated, and are periodically updated as provided in sub-sections (3) and (4) of section 4 of the Act. If the ‘information’ enumerated in clause (b) of section 4(1) of the Act are effectively disseminated (by publications in print and on websites and other effective means), apart from providing transparency and accountability, citizens will be able to access relevant information and avoid unnecessary applications for information under the Act.”

Despite this, these powers are almost never used by ICs across the country. Admittedly, on the face of it, the ICs are not directly empowered to impose a penalty where obligations for proactive disclosures have not been fulfilled. This is because section 20(1) of the RTI Act empowers the commission to impose penalties only on PIOs, while the responsibility of ensuring compliance with section 4 of the RTI Act is actually with the public authority rather than with a specific PIO. Also, the RTI Act does not explicitly provide for the appointment of PIOs to ensure compliance with the provisions of section 4(1) of the RTI Act.

⁸² Chapter 7, RaaG & CES 2014, *Op. Cit.*

⁸³ Source: <http://righttoinformation.info/2053/national-level-public-hearing-on-10-years-of-the-right-to-information-act/>

⁸⁴ Section 5.4.2, RaaG & CES 2014, *Op. Cit.*

There are at least three ways out of this dilemma. One, public authorities can consciously designate public information officers with the responsibility to ensure that all information required to be proactively disclosed has actually been put out, updated in time, and follows the other requirements laid down under section 4. There is no bar in the RTI Act to appointing such PIOs and there is sufficient thrust on the proper implementation of the RTI Act to justify such an appointment. Besides, as public authorities are given the responsibility of implementing the provisions of section 4, they are *ipso facto* authorised to allocate that responsibility to one of their officials.

Further, it makes administrative sense for the PIO of each department or section to be made additionally responsible for ensuring that all information, in their jurisdictions, that is required to be proactively disseminated, be so disseminated. If this is done, then the information commissions can penalise the concerned PIO, using the powers they have under section 20(1), read with their powers under section 19(8), especially as the refusal to proactively disclose the statutorily mandated information, even after having been directed to do so, would legally qualify to be obstruction to supply of information, and would therefore attract a mandatory penalty under section 20(1) of the RTI Act.

Perhaps one way to persuade PAs to designate PIOs with the responsibility to ensure compliance with proactive disclosure obligations is for Heads of Departments (HoDs) to be personally held responsible for violations of the RTI Act by their department, in the absence of any designated PIO. Considering it is a general principle of administration that the ultimate responsibility for violations lies with the HoD, if responsibility has not been specifically delegated, this would be in keeping with general administrative practice.

Second, the ICs can exercise their powers under section 19(8) to require PAs to penalise errant officials. Even if some ICs feel uncomfortable interpreting the law in this manner, they have powers under section 19(8)(a) to “*require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act*” and can certainly require the PA to take cognizance of the failure of the designated officer (whether a PIO or not) to effectively carry out the required proactive dissemination of information. The IC can also “require” the PA to appropriately penalize the concerned official using their inherent powers, though that would finally be at the discretion of the PA. Besides, the Supreme Court, in **SC CBSE 2011** (quoted above) seems to uphold the powers of the IC to take whatever steps are required to secure compliance with the provisions of the RTI Act!

Third, ICs can exercise their implied powers, which the Supreme Court has repeatedly held that they have, to themselves penalise officers who are not fulfilling their obligations under section 4(1) of the RTI Act. The SC, in **SC Sakiri Vasu 2007**, holds that it is well settled that, once a statute gives a power to an authority to do something, it includes the implied power to use all reasonable means to achieve that objective (see chapter 24(b)(ii) for a detailed discussion). This would suggest that the IC could also directly impose a penalty on other officials, apart from PIOs, who are in violation of the RTI act.

ii) *Compensating those affected by non-compliance of section 4*

Also, where the PA is not adequately responsive to the directions and “requirements” of commissions regarding the violation of section 4 obligations, the IC can also use its powers under 19(8)(b) to “require the public authority to compensate the complainant for any loss or other detriment suffered;”. Therefore, there is nothing to stop the commission from awarding compensation to anyone who complains that information that should have been proactively disseminated under section 4(1) (b), (c) and (d), was not so disseminated and resulted in loss or detriment, even to the extent of forcing the complainant to waste time, effort and money filing and pursuing an RTI application. Considering that over ten lakh (one million)

applicants a year are trying to access information that should have been proactively provided⁸⁵, even a nominal compensation would be a strong incentive for PAs to start conforming to the provisions of section 4(1).

The Central Information Commission and the DoPT seem to have also recognised this possibility for default related to section 4(1)(a), which could also be applicable to defaults relating to other clauses of section 4(1). In a circular⁸⁶ to all ministries and departments, the DoPT has stated:

“The Central Information Commission in a case has highlighted that the systematic failure in maintenance of records is resulting in supply of incomplete and misleading information and that such failure is due to the fact that the public authorities do not adhere to the mandate of Section 4(l)(a) of the RTI Act, which requires every public authority to maintain all its records duly catalogued and indexed in a manner and form which would facilitate the right to information. The Commission also pointed out that such a default could qualify for payment of compensation to the complainant. Section 19(8)(b) of the Act gives power to the Commission to require the concerned public authority to compensate the complainant for any loss or other detriment suffered.”

In a slightly later order, while disposing of an appeal regarding the seeking of details of the authorities charged with the responsibility to monitor section 4 compliance, the CIC observed:

However, what emerges from the appeals is an apparent hiatus in the law with regard to enforcement of compliance with sec. 4 which is a vital element of the law to achieve the objective of the law described in its preamble “to promote transparency and accountability in the working of every public authority”. While, therefore, both appeals are dismissed, this Commission places on record its appreciations of the efforts of appellant Shri Vihar Durve in agitating a point which deserves attention both by the Information Commission and the Government. The clarification of this issue will, therefore, be pursued by the Central Information Commission with the DOPT with reference to the Report of Department Related Parliamentary Standing Committee of on Personnel, Public Grievances Law & Justice to avoid any ambiguity in imposition or enforcement of this clause thereby hopefully leading to closer adherence with the letter and spirit of the law. (CIC/ 000545, CIC/ 000303 dated 30.7.2010)

e) Accessing copies of proactively disclosed information

Despite the importance of proactive disclosures, confusion prevails regarding the obligation of a PA to respond to requests for, and provide copies of, information that has already been proactively disclosed. There is no provision in the RTI Act that allows for denial of information to an applicant if that information has already been proactively disseminated. There are also many good reasons, discussed below, why denying copies of information already proactively disclosed would not be in keeping with the letter and spirit of the RTI Act and not in public interest. There also seems no significant reason why there should be such a refusal, except perhaps to save expense.

Perhaps the correct response to a request for information that is already available on the web would be to communicate the exact web address where it can be accessed to the applicant, but also offer to supply a print out, if that is what is required, at the payment of the prescribed per page charges. Interestingly, at least one order of Gujarat High Court held that if proactively disclosed information was accessed, then the cost, as prescribed in the rules, had to be paid. Thereby, the HC also held that information that had been proactively disclosed could also be accessed under section 6 of the RTI Act, but on payment of the prescribed fee.

“8. We are not impressed by the submission of the party-in-person that the authorities are obliged to provide with the copy of the information free of charge. We are in agreement with the State Information Commission that if any information is

⁸⁵ Chapter 5, RaaG & CES, 2014, *Op. cit.*

⁸⁶ N0.12/192/2009-1R dated 20th January, 2010, on page 87 of *Compilation of OMs & Notifications on Right to Information Act, 2005*. *Op. Cit.*

a part and parcel of the record of the public authority, then it is the duty of the authority to provide inspection of the same to any person free of charge but if any person demands for a certified copy of such information, and since such information is a part of the record of the authority, in such circumstances, the authority would be justified in demanding the requisite fees as provided under the provisions of Section 6 of the Act 2005.” (HC-GUJ Chandravadan Dhruv 2013)

Unfortunately, there is a Delhi High Court order that seems to have held a contrary view. In **DEL-HC Prem Lata 2015**, the HC seems to have held that if any information was published proactively, in pursuance of section 4(1)(b) of the RTI Act, then there was no obligation to provide copies of such information, even if asked for through an RTI application.

Such an interpretation of section 4 (1)(b) raises various issues. For one, a substantial proportion of the information that is proactively disclosed, especially at the central and state government levels, is proactively disclosed over the web. But as per recent estimates⁸⁷, less than 25% of the Indians have access to the web. Of these also, many might not have access to internet connections which are fast enough or reliable enough to allow the downloading of documents. In any case, there could be no justification to restrict over 80% of the Indian population from exercising their fundamental right to information, and permit the exercise of this right only to the well-heeled broad-band subscribers. This could not have been the intention of the Parliament, nor of the judiciary.

In fact, such an interpretation of the RTI Act converts section 4 from being a very progressive section of the RTI Act to being a very regressive one. For if the interpretation of the Delhi High Court is accepted, then by proactively disclosing any information on the web you immediately restrict access to less than 25% of the people of India!

Provisions of section 7 (9) of the RTI Act also spell out the obligation of the public authority to ordinarily provide information in the form in which it is sought. Though certain exceptions are provided, the fact that information has been put out on the web or otherwise proactively disclosed is not an exception to this general obligation.

Also, section 4(3) of the RTI Act requires that:

“For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.”

Therefore, if information being disclosed proactively under section 4(1) of the act is more easily available to some members of the public through getting a copy then section 4(3) of the law obliges the public authority to provide the copy.

Where information has been proactively disclosed through notice boards, posters, or publications, these are location specific and it cannot be expected that the people of India can only exercise their fundamental right to information if they traverse the length and breadth of the country to get to that one spot outside a specific office which proactively displays the information that they are interested in.

Further, under the RTI Act, certified copies of records can be sought, as often they are required in legal proceedings. Wherever certified copies are sought in a physical form, the public authority is obliged to provide the same, whether these have been proactively disclosed or not. Else, such a practice would add a new exemption to the disclosure of information, which is not provided for in Section 8 or 9 of the RTI Act.

Finally, whereas information once provided in a physical form cannot be changed or manipulated, information available online can be edited, updated or even deleted. While there are government guidelines related to uploading and maintaining data on government websites, unfortunately experience suggests that these are rarely followed. Till such time that all government websites maintain information in a credible manner providing date of upload, access to previous versions of the website etc., it is a violation of citizens' right to information to deny people information in hard copies.

⁸⁷<http://assochem.org/newsdetail.php?id=6109>

Unfortunately, the CIC and some of the SICs have displayed a tendency to hold that if information was available proactively then there was no obligation to supply it in response to an RTI application. In a case where the appellant was not provided information and was told that information was available on the website, the CIC was not supportive of the appellant's plea for information:

"The respondent stated that this information was already in the public domain as these were well known DOPT guidelines and accordingly a response had been sent to the appellant. In this light, the respondent stated that no further action is needed on this letter... Decision: No further action is required in the matter." (CIC/000084 dated 10.04.2013)

In another appeal, against the Supreme Court PIO, the IC held:

"We have checked the Supreme Court website ourselves and find the specific documents which the Appellant wants available there under the link publications. Therefore, the Appellant can access these documents by visiting the Supreme Court of India website. If he wants the books, he can also purchase those from any standard law book store since these are priced publications. In view of this we are not inclined to direct the CPIO to provide the copies of these books to him separately.." (CIC/000269 dated 10.07.2013)

In an appeal pertaining to an RTI request filed with the Assam SIC where the appellant was denied information sought by him - a copy of an order of the Supreme Court and orders of the Assam IC – on the ground that these were available on websites, the IC observed:

"As regards furnishing of the copies of the Hon'ble Supreme Court's order as well as the Assam Information Commission's orders passed after 13.9.2012, the Commission agreed to the contention of the SPIO and advised the appellant to collect the same from the concerning websites." (SIC/ASS/SIC.30/2013 dated 12.11.2013)

f) Agenda for action

- i. Public authorities and political leaders are inclined to complain about the work pressure generated by RTI applications, and sometimes argue that this is distracting public servants from their regular work. However, recent studies have established that a very large proportion of the RTI applications filed in India are seeking information that should have been proactively made public or communicated to the applicant, and mostly has not been done. Therefore, such complaints should be investigated by people through a public audit of how far the concerned PA or department is conforming to proactive disclosure obligations.
- ii. Public authorities should conduct periodic audits (at least six monthly) and identify the type of information that is being repeatedly asked for in RTI applications being received by the PA. Where such information is not exempt under the RTI Act, the PA should start effectively disseminating such information proactively, thereby helping the applicants and reducing its own work load.
- iii. The information commissions should ask, of each matter coming before them for adjudication, whether the information being asked for was required to be proactively made public or communicated to the applicant, as an affected party. Where the answer is "yes", the IC should send directions, as empowered to do under section 19(8) of the RTI Act, to the concerned PA to start disseminating the information proactively and report compliance.
- iv. The ICs should also get annual audits of section 4 compliance done for each public authority and the findings of this audit should be placed before Parliament and the legislative assemblies, and disseminated to the public.
- v. Given the criticality of proactive disclosures, NGOs and RTI movements must also make the compliance with section 4(a) priority issue and must push public authorities to perform better, with the support of the media and the judiciary, where appropriate.

- vi. Further, ICs should penalise the responsible official for any violations of the obligation for proactive disclosure, using the “implied powers” of the commission, as mandated by the Supreme Court.
- vii. Alternatively, the ICs can use their powers under section 19(8) to “require” PAs to take cognisance of violations of the proactive dissemination provision, and “require” PAs to penalise the errant official, using their inherent powers of penalising.
- viii. In any case, if an appeal or complaint before the information commission establishes that the PA did not comply with the requirements for proactive disclosure, then the IC can, under section 19(8), order the PA to pay compensation to the appellant or complainant who had to file an application for information that should have been proactively disseminated. The added time, effort and cost involved in this, besides the opportunity cost of the delay involved, would certainly qualify to be counted as “loss or other detriment suffered”, as required under the RTI Act.
- ix. All non-exempt information, whether proactively disseminated or not, should be available to an applicant through an RTI application. Given the confusion on this point, the Supreme Court needs to be moved to clarify this position. Meanwhile, ICs should enforce this as no binding, contrary, orders exist from the Supreme Court.
- x. DoPT must take appropriate steps to operationalise and implement the recommendation made by a committee set up to examine proactive disclosures (report available from <https://goo.gl/wc0c0b>), that compliance with S 4 be included as one of the performance indicators in the annual performance appraisal report (APAR) of the HoD.

10. No reasons required for requesting information [S. 6 (2)]

Section 6(2) of the RTI Act:

6(2) An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.

Major Issues

The Supreme Court, in various orders, has held that the right to information is a fundamental constitutional right, derivable from the fundamental constitutional right to free speech:

"74...The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. ... To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired." (SC The State of Uttar Pradesh 1975)

"66...The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.

The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest..." (SC S.P. Gupta 1981)

"34...We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform." (SC Reliance Petrochemicals 1988)

The right to get information in a democracy is recognised all throughout and is a natural right flowing from the concept of democracy." (SC Union of India v. Association for Democratic Reforms, 2002).

The subsequent Right to Information Act therefore only facilitated and laid down procedures by which the people of India could exercise this fundamental constitutional right.

An implication of being a fundamental right is that one cannot be asked to justify exercising or invoking it. The very concept of a fundamental right implies that the person who has such a right has it unconditionally. Of course, a fundamental right can be subjected to "reasonable restrictions" as specified in article 19(2) of the Constitution, but the onus is always on those who seek to curtail or restrict the right to establish the justification for doing so, and never on the person who has a fundamental right to justify why she is exercising it.

Take the most fundamental of fundamental rights, the right to life. Whereas under special circumstances, like during war or on the imposition of capital punishment, it can be curtailed, you cannot ask of a person who anticipates a threat to her life, what gives her the right to live. Each human being, *qua*

human being, has an unquestionable right to life for which no justification needs to be furnished. This is true for a fundamental right to information also.

Similarly, a fundamental right is not dependent on the credentials of a person, for by definition it is the right of every human being, irrespective of status, wealth, education, or even criminal record.

Therefore, section 6(2) of the RTI Act only codifies what follows from the fundamental rights status of our right to information. Though this section of the RTI Act is clear and unambiguous, it has still not become an accepted part of the jurisprudence of India. Many PIOs and even some ICs and High Courts continue to reject requests for information because either no reason is given for seeking the information or the reasons given are not found to be good enough.

a) Universal applicability

Though there are no SC orders dealing with this issue, in at least two HC orders the provisions of section 6(2) have been specifically upheld. The Bombay High Court has held that under the RTI Act no reasons can be asked for why information is being sought.

"5. I have considered the submissions of the learned Counsel appearing for the respective parties. I have also gone through the records and the relevant material with the assistance of the learned Counsel. Section 6(2) of the Right to Information Act provides thus:

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6. On plain reading of the said provisions the question of giving any reasons or showing any nexus as to why such information is sought by a citizen is not at all sustainable. Hence the finding of the respondent No. 3 to the effect that the petitioner has to show the nexus as to why such information is required is erroneous and deserves to be quashed and set aside."(**HC-BOM Kashinath Shetye 2012**)

In **HC-MAD The Public Information Officer Vs. The Central Information Commission 2014**, the High Court initially held that just like there is a difference between the "right to property" and the "right to claim property", so there is a difference between "right to information" and the "right to seek information". The HC further maintained that all rights must have a legal basis:

"20. Under the RTI Act, a citizen of this country has a right to information as defined under Sections 2(f) and 2(j), of course, subject to certain restrictions as provided under the Act. What information one can seek and what right one can have, are specifically contemplated under Sections 2(f) and 2(j) respectively. However, the word "right" is not defined under the RTI Act. In the absence of any definition of "right", it has to be understood to mean that such "right" must have a legal basis. Therefore, the "right" must be coupled with an object or purpose to be achieved. Such object and purpose must, undoubtedly, have a legal basis or be legally sustainable and enforceable. It cannot be construed that a request or query made 'simpliciter', will fall under the definition of "right to information". The "right" must emanate from legally sustainable claim. There is a difference between the "right to information" and the "right to seek information". It is like the "right to property" and the "right to claim property". In the former, such right is already accrued and vested with the seeker, whereas, in the latter, it is yet to accrue or get vested. Likewise, a person who seeks information under the RTI Act, must show that the information sought for is either for his personal interest or for a public interest. Under both circumstances, the information seeker must disclose atleast with bare minimum details as to what is the personal interest or the public interest, for which such information is sought for. If such details are either absent or not disclosed, such query cannot be construed as the one satisfying the requirement of the RTI Act. The restrictions imposed under the RTI Act, though are in respect of providing certain informations, certainly, there are certain inbuilt restrictions imposed on the applicant as well. (emphasis added)

However, this order was reviewed by the same bench within a week. The bench revised its stand and upheld the applicability of section 6(2):

"2. On 17.9.2014 we have allowed W.P. No. 26781 of 2013 and quashed the impugned order, dated 23.1.2013 passed by the first respondent-Commission. In the said order dated 17.9.2014, we have made certain general observations in paragraphs 20 and 21, stating that the RTI application should contain bare minimum details of reasons for which the information is sought for. However, the said general observations were made without noticing Section 6(2) of the RTI Act 2005..."

"3. Therefore, it is evident that a person seeking information is not required to give any reason for requesting such information. Hence the general observations made in paragraphs 20 and 21 of the said order, dated 17.9.2014, is an error apparent on the face of record contrary to the statutory provision. The said error has been noticed by us after pronouncing the order dated 17.9.2014...."

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"5. Thus we are convinced that the general observations made in paragraphs 20 and 21 of the said order, dated 17.9.2014 in W.P. No. 26781 of 2013 are against the abovesaid provision of law, namely section 6(2) of the RTI Act, we are of the view that these two paragraphs...have to be deleted." (**Suo-moto review of HC-MAD The Public Information Officer Vs. The Central Information Commission 2014**, dated 23.9.2014)

Unfortunately, several IC orders, and even a few HC orders, upheld denial of information on grounds that the information sought was not in public interest or appeared to be of no use to the applicant, even though the information did not attract any of the exemptions listed in the RTI Act. In some cases, the ICs had directly asked of the applicant why they were seeking the asked for information. Clearly implicit in such orders of the adjudicators was the assumption that information could be denied if the reasons for seeking information failed to satisfy the PIO or the appellate authorities. This seemed to go against the letter and spirit of the RTI Act.

Some typical examples of such HC & IC orders are given below. The Gujarat High Court, in **HC-GUJ Thakor Sardarji Bhagvanji 2014**, stated:

"4. We repeatedly asked Mr. Vijay H. Nangesh, learned Counsel for the appellant to show the reason as to why the documents registered for seven years are required by the appellant, who belongs to B.P.L. category. Mr. Nangesh could not give any reason and repeatedly argued that there is no requirement in the Act to disclose any reason. The appellant has not stated either in the petition or in the appeal that he is a public spirited citizen and has filed any public interest litigation in the Court.

In the case of IC orders, a 2013 order of the CIC, without citing any provisions of the RTI Act which can be used to deny information to an applicant and without giving any details of information sought, upheld the denial of information stating:

"I have carefully perused the RTI application. I have also heard the appellant. The appellant is seeking frivolous information which is of no use either to him or to anybody else. Hence, the appeal is being dismissed." (**CIC/000795 dated 12.07.2013**)

In another order, the appellant sought a copy of the application form for applying for a photo identity card for dependent family members (father and mother) staying in Madurai, Tamil Nadu which was an area not covered by the Central Government Health Scheme (CGHS). The information was denied to the appellant by the PA merely because the CGHS did not cover the area where his parents lived. The CIC upheld the decision stating that:

"As the appellant's parents, admittedly are staying at Madurai, supply of application form would be of no use to him. In the premises, the matter is being closed at the Commission's end." (**CIC/000980 dated 02.07.2013**)

b) Applicability in court proceedings

In what is perhaps the most puzzling of the HC orders dealing with section 6(2), **HC-ALL Alok Mishra 2012** holds that if an applicant approaches the court when they are unable to access information under the

RTI Act, then they must justify and prove that they had a good reason for originally seeking the information. This is despite the fact that the RTI Act specifically states that no reason is required to be given for seeking information.

The HC states that in their opinion most of the information asked for does not concern the petitioner. Though the HC concedes that under the RTI Act no reasons need be given for seeking information, but it holds that once an applicant approaches the High Court under Article 226 of the Constitution “*which is a discretionary constitutional remedy to be used for bona fide purposes they must satisfy the Court, that they have approached the Court with bona fide purposes with clean hands.*”

The HC goes on to maintain that the petitioners, instead of approaching the state information commission, have approached the HC “*seeking extraordinary remedies, which can be given only to the bona fide litigants.*” The HC made these observations despite the fact that the petitioners had filed an appeal before the Central Information Commission, as the public authority from which they were seeking information was an office of the central government, and only then moved the High Court. The filing of the second appeal had been recorded in the order, and yet there was the insistence that they should have approached the SIC, which does not have jurisdiction over the central government

“4. ... We also find that most of the information sought has no concern with the petitioners, nor the petitioners can have or have shown any object or purpose for which they require the said information.

5. The purpose of Right to Information Act, 2005 is for bringing the transparency in functioning of public authorities. ... The Act does not provide for any reason to be given, or to show bona fides in seeking information. The petitioners in this case have not chosen their rights under (The) Right to Information Act by approaching the State Information Commission, if they have not received the information within the time prescribed from the Public Information Officer or the Appellate Authority in the department. They have rather approached this Court under Article 226 of the Constitution of India for a direction to the respondents to provide information sought by the petitioners.

6. Once the petitioners have chosen to seek directions by filing a writ petition under Article 226 of the Constitution of India, which is a discretionary constitutional remedy to be used for bona fide purposes they must satisfy the Court, that they have approached the Court with bona fide purposes with clean hands.

7. We asked learned counsel appearing for the petitioners about their concern and purpose of seeking the information. The petitioners are practising advocates of the High Court. They have neither placed, nor could explain the purpose to seek such information which will virtually block the functioning of the North Central Zone Cultural Centre at Allahabad. The petitioners are unable to give any reason, or object for seeking the information. The counsel appearing for petitioners has chosen to keep quite and did not answer on questions inspite of repeated requests.

8. Recently we have noticed a large number of writ petitions filed for enforcement of the remedies under the Right to Information Act, which has made it necessary for the Court in exercise of its powers under Article 226 of the Constitution of India, to review the object and purposes and also the methods opted by certain persons in seeking information. If the Court notices, in exercise of powers of issuing writ as extraordinary remedies, that the object and purpose is not bona fide, it can always refuse the relief.

9. In the facts and circumstances of the case in which no reason has been given by the petitioners we find that filing of this writ petition, is not for bona fide purposes. Instead of waiting for information to be given or to approach State Information Commission, under (The) Right to Information Act the petitioners have chosen to approach the High Court under Article 226 of the Constitution of India, seeking extraordinary remedies, which can be given only to the bona fide litigants. The information sought clearly appears to serve oblique purposes. On the response to our questions put to the counsel, it is apparent that the petitioners as young advocates have filed this writ petition as a proxy for any person who has some axe to grind against the respondents. The petitioners under the Advocates Act, are not supposed to act for such purpose for their clients. This writ petition is accordingly dismissed.”

The legal argument is intricate and difficult to unravel. The HC order provides no precedence or legal basis for the conclusions drawn. It does not even list or indicate what purposes would be considered *bona fide*, and why. Also, they talk about the petitioners approaching the court with clean hands, but it is not clear whether this would still apply if the petitioner was the public authority seeking redress from a direction of the information commission to dispense information. Would the original applicants still have to reveal the reasons for seeking information, even though they had not sought legal remedy?

This is another example of an order that should be assessed on the basis of the principles laid down by the Supreme Court on how statutes must be interpreted. Of specific relevance would be the discussion and citations given in chapter 1.

c) Exceptions

Though in general the law prohibits the seeking of the reasons why some information is requested, there are some inherent exceptions in the RTI Act. The most obvious one is where even exempt information can be made public if there is adequate public interest likely to be served by the disclosure, specifically for all clauses of section 8(1), as specified in section 8(2).

Clearly, to establish this it would often become necessary for the applicant to indicate what public interest, and to what extent, is likely to be served through accessing the information being sought. This is, in a manner, seeking out the reasons behind the request for information. Nevertheless, unless specifically required under the law, the general dictum of section 6 (2) must apply universally.

Similarly, in section 7(1) of the RTI Act the PA is obligated to provide information within 48 hours of the receipt of an application, rather than the normal thirty days, if the information being sought concerns the life and liberty of a person. Here, again, in order to avail the shortened time line, it might have to be demonstrated by the applicant that the information being sought does concern either life or liberty, and this might involve disclosing the purpose of seeking such information.

Section 24 of the RTI Act obliges even those bodies to provide information that might otherwise be exempt, being security or intelligence organisations, if the information being sought pertains to allegations of corruption or human rights violation. It might, therefore, become necessary, in the process of establishing the link of the asked for information with corruption and human rights violation, to reveal the purpose for seeking the information.

In some of the exceptions listed under the RTI Act, especially the exceptions relating to privacy or fiduciary relationship, applicants might be legitimately called upon to provide some additional information to establish that the exemptions of privacy or of a fiduciary relationship do not apply to them.

d) Agenda for action

- i. Information commissions need to recognise the applicability of section 6(2), as upheld by various judicial orders.
- ii. Governments and competent authorities whose rules or practices are in violation of this section, should be penalised by information commissions and, where required, by the concerned high court.
- iii. The question of whether section 6(2) remains applicable even when matters relating to the RTI Act are raised through writs in the high courts or in the Supreme Court, needs to be settled, especially in the light of *HC-ALL Alok Mishra 2012*, discussed above.

11. Transferring RTI applications among and within PAs [S. 6(3) read with S. 5(4)&(5)]

Sections 5(4), (5) & 6(3) of the RTI Act:

“5(4) The Central Public Information Officer or State Public Information Officer, as the case may be, may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties.

(5) Any officer, whose assistance has been sought under sub-section (4), shall render all assistance to the Central Public Information Officer or State Public Information Officer, as the case may be, seeking his or her assistance and for the purposes of any contravention of the provisions of this Act, such other officer shall be treated as a Central Public Information Officer or State Public Information Officer, as the case may be.”

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“6(3) Where an application is made to a public authority requesting for an information,—

(i) which is held by another public authority; or

(ii) the subject matter of which is more closely connected with the functions of another public authority, the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:

Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.”

Major Issues

These are important provisions of the RTI Act for they recognise that the common person might not always know what information is held with what department. Therefore, rather than insisting that each applicant find out where the required information is, thereby wasting a lot of time and effort, this obligation is put on the PIO and the public authority who, after all, are in a far better position to determine what information is held where.

a) Illegal transfer of RTI applications within the public authority

Unfortunately, these very progressive provisions in the RTI Act have, instead of helping RTI applicants, been converted by some PIOs into mechanisms for hindering access to information. Increasingly PIOs are transferring a single application to numerous other PIOs within their own PA and treating it, illegally, as a transfer under S. 6(3). They are then asking each of these PIOs to directly respond to the applicant who, having filed one application, is now confronted with the prospect of dealing with dozens of PIOs, filing dozens of first appeals and second appeals, and all else that this involves.

For instance, when an application was filed with the Delhi Urban Shelter Improvement Board as part of the 2014 study undertaken by RaaG, it was transferred u/s 6(3) by the DUSIB HQ to more than 70 PIOs within the same PA. Clearly, the information sought was within the same public authority, and yet the application was transferred under Section 6(3). Therefore, seventy PIOs had to be contacted, and seventy appeals filed, instead of one.

As per the RTI Act, any application filed by an applicant, in which the information sought is held within the PA where it is filed, or the subject matter of which is most closely associated with the functions of the PA where it is filed, it cannot be transferred under Section 6(3) of the Act within the same PA. Only section 5(4) can be used by the receiving PIO to seek assistance of other officers within the same PA in order to

retrieve and provide the relevant information to the information seeker. It is the responsibility of the receiving PIO to gather this information and dispatch it, in time, to the applicant. Only where penalty proceedings are initiated by the IC, the other officials contacted by the original PIO, if they have been remiss, get treated as deemed PIOs under section 5(5).

If PIOs are allowed to transfer applications to other PIOs within the PA, in contravention of the law, PAs would wriggle out of the obligations under the RTI Act by appointing multiple PIOs and allowing them to transfer RTI applications amongst themselves, thereby over burdening the RTI applicant, causing unnecessary delays, and effectively blurring accountability of individual officials.

There are two High Court orders on this issue. Unfortunately, despite the progressive HC orders, quoted below, there appears to be no serious effort on the part of public authorities to put an end to this practice, or on the part of ICs to impose deterrent penalties.

In **HC-DEL Ministry of Railways 2014**, the HC made an important point which is of great relevance these days. It held that if a PIO transferred an application to one or more officials in the same public authority, then this did not absolve the original PIO from being legally responsible for ensuring that the provisions of the RTI Act were fully complied with.

“15. The plain language of Section 6(3) of the Act indicates that the public authority would transfer the application or such part of it to another public authority where the information sought is more closely connected with the functions of the other authority. The reliance placed by the learned counsel for the petitioner on the provisions of Section 6(3) of the Act is clearly misplaced in the facts and circumstances of the case. This is not a case where penalty has been imposed with respect to queries which have been referred to another public authority, but with respect to queries that were to be addressed by the public authority of which petitioner no. 2 is a Public Information Officer. Section 6(3) of the Act cannot be read to mean that the responsibility of a CPIO is only limited to forwarding the applications to different departments/offices. Forwarding an application by a public authority to another public authority is not the same as a Public Information Officer of a public authority arranging or sourcing information from within its own organisation. In the present case, undisputedly, certain information which was not provided to respondent would be available with the Railway Board and the CPIO was required to furnish the same. He cannot escape his responsibility to provide the information by simply stating that the queries were forwarded to other officials. Undeniably, the directions of CIC were not complied with.”

In **HC-BOM Mahendra 2013** the High Court made the important point that even if a PIO forwarded the RTI application to other PIOs, if the original PIO was in a position to supply the requested information, then he or she was liable for imposition of penalty.

“13. Therefore, upon careful perusal of observations/reasons recorded by respondent No. 1, it appears that, even the petitioner could have furnished information as sought by respondent No. 2. This finding recorded by the respondent No. 1 is based upon the material placed on record.

14. The contention of the petitioner that, since the petitioner was not responsible to supply information and in absence of fastening liability on the B.D.O., and Talathi, no penalty could have been imposed upon the petitioner, deserves no consideration since penalty is imposed after recording finding that, even the petitioner could have supplied the said information, however, he tried to avoid to furnish such information as prayed by respondent No. 2 in his application dated 30/11/2010. It further appears that, not only that, the second appellate authority has adverted to the written documents/material placed on record, however, the petitioner was given opportunity to put forth his contention before the second appellate authority. Therefore, there is no substance in the contention that, the petitioner was not heard before imposing such penalty under section 25 of the said Act. While considering the case in its entirety under extraordinary writ jurisdiction, in the light of discussion herein above, view taken by the second appellate authority i.e., respondent No. 1 appears to be plausible, reasonable and in consonance with the material placed on record. No case is made out for interference in the impugned judgment and order. Writ Petition sans merit, hence rejected.”

The same point has been made by the DoPT in a circular⁸⁸ sent to all departments:

“Sub-sections (4) and (5) of section 5 of the Right to Information Act, 2005 provide that a Public Information Officer (PIO) may seek the assistance of any other officer for proper discharge of his/her duties. The officer, whose assistance is so sought, shall render all assistance to the PIO and shall be treated as a PIO for the purpose of contravention of the provisions of the Act. It has been brought to the notice of this Department that some PIOs, using the above provision of the Act, transfer the RTI applications received by them to other officers and direct them to send information to the applicants as deemed PIO. Thus, they use the above referred provision to designate other officers as PIO.

2. According to the Act, it is the responsibility of the officer who is designated as the PIO by the public authority to provide information to the applicant or reject the application for any reasons specified in sections 8 and 9 of the Act. The Act enables the PIO to seek assistance of any other officer to enable him to provide information to the information seeker, but it does not give him authority to designate any other officer as PIO and direct him to send reply to the applicant. The import of sub-section (5) of section 5 is that, if the officer whose assistance is sought by the PIO, does not render necessary help to him, the Information Commission may impose penalty on such officer or recommend disciplinary action against him the same way as the Commission may impose penalty on or recommend disciplinary action against the PIO.”

And yet this practice flourishes and grows!

b) Defining a public authority

The problem gets aggravated by there being no common understanding of what constitutes a single public authority. Therefore, in some departments there is a tendency to treat every office as a separate public authority. Though the Second Administrative Reforms Commission made the recommendations listed⁸⁹ (Box 7), little action seems to have been taken, especially in terms of listing (point (ii)) all the public authorities that come under the purview of each ministry or department.

Perhaps the best way of helping members of the public who do not always know where to file their applications, is to have a single window approach. This has been successfully tried by some states and by the central government. The central government has designated APIOs of Department of Post as assistant public information officers of the Central Government⁹⁰ who would forward the application filed with them to the appropriate public authority.

<p style="text-align: center;">BOX 7</p> <p style="text-align: center;">Recommendations of the second ARC</p> <p>(i) At the Government of India level, the Department of Personnel & Training has been identified as the nodal department for implementation of the RTI Act. This nodal department should have a complete list of all Union Ministries/Departments, which function as public authorities.</p> <p>(ii) Each Union Ministry/Department should also have an exhaustive list of all public authorities, which come within its purview. The public authorities coming under each Ministry/Department should be classified into (i) constitutional bodies (ii) line agencies (iii) statutory bodies (iv) public sector undertakings (v) bodies created under executive orders (vi) bodies owned, controlled or substantially financed and (vii) NGOs substantially financed by Government. Within each category an up-to date list of all public authorities has to be maintained.</p> <p>(iii) Each public authority should have the details of all public authorities subordinate to it at the immediately next level. This should continue till the last level is reached. All these details should be made available on the websites of the respective public authorities, in a hierarchical form.</p> <p>(iv) A similar system should also be adopted by the States.</p>

⁸⁸ No.1/14/2008-IR dated 28th July 2008, on page 23 of *Compilation of OMs & Notifications on Right to Information Act, 2005*. Op. Cit.

⁸⁹ As quoted in No. 1/12/2007-IR dated 31 July 2007, on page 65 of *Compilation of OMs & Notifications on Right to Information Act, 2005*. Op. Cit.

⁹⁰ http://rti.gov.in/RTICorner/Guide_2013-issue.pdf, p6 point 9.

c) Transferring applications to other public authorities

Despite the progressive legal requirement that PIOs must transfer RTI applications seeking information that they don't hold, to PAs who hold the information, the actual experience is that most often PIOs do not do so. And though there is a requirement that they effect this transfer in five days, it is often delayed, even when it is made.

The Department of Personnel and Training (DoPT), Government of India, which is the nodal department for the implementation of the RTI Act, instead of frontally dealing with this problem, sent out a circular (see BOX 8) which gave mixed messages to public authorities and PIOs. Among other things, they suggested that if a PIO did not hold the asked for information and could not find out who held it, then the applicant should be informed that the PIO cannot determine where the information asked for is available (paragraph 3(i) of circular 1, Box 8). However, this is going beyond the RTI Act. Surely the PIO is in a far better position to determine which public authority has the information sought, than a member of the public.

The DoPT could have suggested that if the PIO was unable to determine the correct PA, after a reasonable effort, then the PIO should forward the application to DoPT, or the corresponding state nodal department for the RTI Act. The Central Department of Personnel and Training, and the various state departments of administrative reforms, and other such, could, in consultation with the allocation of business rules of the Central Government⁹¹ and corresponding rules of state governments, forward the RTI application to the correct dealing department. Only where the nodal department determined that such information was not held by any public authority, could the applicant be accordingly informed. This would be in consonance with the RTI Act.

Perhaps even worse is the exhortation in paragraph 3(iii) of circular 1, asking the PIOs to return to the applicant any application which seeks information that is with two or more public authorities. This is a direct violation of section 6(3) and the subsequent clarification in circular 2, paragraph 2, does not mitigate this violation.

Ironically, the DoPT offers the justification that “*sub-section (3) refers to 'another public authority' and not 'other public authorities'. Use of singular form in the Act in this regard is important to note.*” They forget their own General Clauses Act, 1897, which specifies, in Section 13, that ordinarily singular would include plural!

In paragraph 3(iv) of circular 1, the DoPT suggests to the PAs and PIOs that where the information being sought is concerning a state or a union territory, and not the Central Government, they need not bother about section 6(3) and can just return the application to the applicant, and not forward it to the concerned state/UT. But, this again is a violation of section 6(3) of the RTI Act, which makes no distinction between the centre, the states, and the union territories, and does not limit the scope of the section to PAs only within the government that is initially approached.

Therefore, it seems clear that Parliament intended the transfer clause to be applicable across the country as it would be reasonable to assume that the Parliament was aware of the federal structure of India when it passed the RTI Act.

Most worrying is the fact that the DoPT has taken upon itself to interpret and rewrite the RTI Act, without the mandate or authority to do either. This is despite the fact that in ***HC-DEL Union of India Vs. Col. V.K. Shad 2012*** the HC reiterates that the RTI Act overrides DoPT instructions, if there is a conflict.

“16.3 ...Therefore, the argument of the petitioners that the information can be denied under Army Rule,184 or the DoPT instructions dated 23.06.2009 are completely untenable in view of the overriding effect of the provisions of the RTI

⁹¹ For a copy, see http://cabsec.nic.in/allocation_order.php

Act. Both the Rule and the DoPT instructions have to give way to the provisions of Section 22 of the RTI Act... The Rule and the instruction can, in this case, at best have the flavour of a subordinate legislation. The said subordinate legislation cannot be taken recourse to, in my opinion to nullify the provisions of the RTI Act.”

Despite all this, PIOs continue to reject applications for information that is held by some other public authority, rather than transferring them to such an authority. And ICs continue to reject complaints and appeals against this practice.

In at least one order from Assam SIC, the IC cited the above mentioned DoPT OM to condone this practice of denying information if it is not held by the public authority, and required the information seeker to file information queries to the correct PA.

An RTI application was filed to the DRDA, Cachar district, seeking details of funds utilisation under MNREGA. While part information was furnished, for the points seeking information on the reasons for the non-completion of a specific work and the amount returned by gram panchayats in Cachar district, the applicant was advised by the PA to collect information from the block development officers. The SIC, in its order, held:

“As regards collecting the information available with different Public Authorities also, the SPIO was correct in advising the appellant to obtain the same from the said Public Authorities as provided in the Govt. of India’s OM No. F.10/2/2008-IR, dt. 24.9.2010.” (SIC/ASS/CCR.51 dated 26.11.2013)

As discussed earlier, not only is the DOPT OM without jurisdiction and contrary to the law, in the current matter, as BDOs would administratively be under the DRDA, the PIO should have invoked Section 5(4) in order to seek their assistance in providing information.

Some other instances are discussed below where ICs, ignoring the obligation of the PIO to transfer an RTI application to the appropriate authority, as stipulated in Section 6(3) of the RTI Act, directed information seekers to file separate RTI applications.

An RTI application was filed with the office of the Deputy Commissioner, Kamrup. During the hearing, the IC agreed with the PA that the information sought was not clear. Therefore, the IC advised the appellant to specify the information he was seeking. The order went on to state:

“...in case, some of the information is supposed to be available with more than one other Public Authorities, then she (PIO? sic) shall advise the appellant to submit separate applications to each of the Public Authorities where the information is thought to be available”. (SIC/ASS/KP(M)96 dated 27.06.2013)

In another case, an information request was sent to the Directorate of Training & Technical Education, Govt. of Delhi, seeking details regarding recognition of a technical college in Kerala and the courses offered by it. During the hearing at the CIC, the public authority claimed that the said college was under the jurisdiction of Government of India and not the Government of Delhi. The CIC disposed the appeal with the view that *“the Commission advises the appellant to address his RTI application to the appropriate authority for seeking the desired information” (CIC/001992 dated 31.03.2016).*

There was no discussion whatsoever on why the RTI application was not transferred by the PIO to the appropriate authority, as required under Section 6(3).

d) Agenda for action

- i. ICs must clarify that any information request that is made by an applicant, in which the information sought is held within the PA where it is filed, or the subject matter of which is most closely associated with the functions of the PA where it is filed, cannot be transferred under Section 6(3) of the Act within the same PA. Only Section 5(4) can be used by the PIO to seek assistance of other officers within the same PA to retrieve and provide the relevant information to the information seeker.

- ii. ICs need to recognise the correct legal position, and take cognisance of the relevant judicial orders. They need to treat transfer of applications within PAs as a form of obstruction, and start penalising PIOs who make such transfers.
- iii. Perhaps a definitive order to this effect from the Supreme Court would also help, and to that end, the SC should be petitioned .
- iv. The government should urgently bring out a list of distinct public authorities, along the lines recommended by the Second Administrative Reforms Commission.
- v. The DoPT should immediately rescind its circular encouraging PAs to return applications asking for information held by two or more PAs, and ICs should start penalising those PIOs that do not appropriately respond to such applications, in violation of the legal requirement. If the DoPT refuses to rescind this circular, the CIC should direct it to and take further legal action, if required.
- vi. Perhaps one solution is to designate each post office in the country as an APIO for both state and central governments, and to give these post offices the responsibility of getting the RTI application to the correct PA and PIO. As an institution, they have both the skills and the infrastructure to do this, and to do it well.
- vii. This would be particularly effective if the APIO, when unable to determine the correct PA, and after a reasonable effort, could forward the application to DoPT, or the corresponding state department, which is the nodal department for the RTI Act. These departments can consult the relevant allocation of business rules and determine the correct PA to whom the application can be transferred.

BOX 8

Circular 1

NO.10/2/2008-IR

Government of India

Ministry of Personnel, Public Grievances & Pensions

Department of Personnel & Training

North Block, New Delhi

Dated: the 12th June, 2008

Subject: RTI applications received by a public authority regarding information
concerning other public authority/authorities.

It has been brought to the notice of this Department that requests are made to the public authorities under the Right to Information Act for pieces of information which do not concern those public authorities. Some times, such an information is sought, a part or no part of which is available with the public authority to which the application is made and remaining or whole of the information concerns another public authority or many other public authorities. A question has arisen as to how to deal with such cases.

2. Section 6(1) of the RTI Act, 2005 provides that a person who desires to obtain any information shall make a request to the public information officer (PIO) of the concerned public authority. Section 6(3) provides that where an application is made to a public authority requesting for any information which is held by another public authority or the subject matter of which is more closely connected with the functions of another public authority, the public authority to which such application is made, shall transfer the application to that other public authority. A careful reading of the provisions of sub-section (1) and sub-section(3) of Section 6, suggests that the Act requires an information seeker to address the application to the PIO of the 'concerned public authority'. However, there may be cases in which a person of ordinary prudence may believe that the piece of information sought by him/her would be available with the public authority to which he/she has addressed the application, but is actually held by some another public authority. In such cases, the applicant makes a bonafide mistake of addressing the application to the PIO of a wrong public authority. On the other hand where an applicant addresses the application to the PIO of a public authority, which to a person of ordinary prudence, would not appear to be the concern of that public authority, the applicant does not fulfill his responsibility of addressing the application to the 'concerned public authority'.

3. Given here in under are some situations which may arise in the *matter* and action required to be taken by the public authorities in such cases:

(i) A person makes an application to a public authority for some information which concerns some another public authority. In such a case, the PIO receiving the application should transfer the application to the concerned public authority under intimation to the applicant.

Box 8 contd...

However, if the PIO of the public authority is not able to find out as to which public authority is concerned with the information even after making reasonable efforts to find out the concerned public authority, he should inform the applicant that the information is not available with that public authority and that he is not aware of the particulars of the concerned public authority to which the application could be transferred. It would, however, be the responsibility of the PIO, if an appeal is made against his decision, to establish that he made reasonable efforts to find out the particulars of the concerned public authority.

ii) A person makes an application to a public authority for information, only a part of which is available with that public authority and a part of the information concerns some 'another public authority.' In such a case, the PIO should supply the information available with him and a copy of the application should be sent to that another public authority under intimation to the applicant.

(iii) A person makes an application to a public authority for information, a part of which is available with that public authority and the rest of the information is scattered with more than one other public authorities. In such a case, the PIO of the public authority receiving the application should give information relating to it and advise the applicant to make separate applications to the concerned public authorities for obtaining information from them. If no part of the information sought, is available with it but is scattered with more than one other public authorities, the PIO should inform the applicant that information is not available with the public authority and that the applicant should make separate applications to the concerned public authorities for obtaining information from them. It may be noted that the Act requires the supply of such information only which already exists and is held by the public authority or held under the control of the public authority. It is beyond the scope of the Act for a public authority to create information. Collection of information, parts of which are available with different public authorities, would amount to creation of information which a public authority under the Act is not required to do. At the same time, since the information is not related to anyone particular public authority, it is not the case where application should be transferred under sub-section (3) of Section 6 of the Act. It is pertinent to note that sub-section (3) refers to 'another public authority' and not 'other public authorities'. Use of singular form in the Act in this regard is important to note.

(iv) If a person makes an application to a public authority for some information which is the concern of a public authority under any State Government or the Union Territory Administration, the Central Public Information Officer (CPIO) of the public authority receiving the application should inform the applicant that the information may be had from the concerned State Government/UT Administration. Application, in such a case, need not be transferred to the State Government/UT Administration.

4. Copies of the OM may be brought to the notice of all concerned.

Sd.

(K.G. Verma)

Box 8 contd...

Circular 2

N0.F. 10/2/2008-IR

Government of India

Ministry of Personnel, PG and Pensions

Department of Personnel & Training

North Block, New Delhi

Dated September 24, 2010

OFFICE MEMORANDUM

Subject:- RTI applications received by a public authority regarding information concerning other public authority/authorities.

The undersigned is directed to refer to this Department's OM of even number dated 12th June, 2008 on the above noted subject, clause (iii) of para 3 of which provides that if a person makes an application to the public authority for information, a part of which is available with that public authority and the rest of the information is scattered with more than one other public authorities, the Public Information Officer (PIO) of the public authority receiving the application should give information relating to it and advise the applicant to make separate applications to the concerned public authorities for obtaining information from them. It further provides that if no part of the information is available with the public authority receiving the application but scattered with more than one other public authorities, the PIO should inform the applicant that information is not available with the public authority and that the applicant should make separate application to the concerned public authorities for obtaining information from them.

2. The matter has been examined in consultation with the Chief Information Commissioner, Central Information Commission and it has been decided to advise the PIOs that if the details of public authorities who may have this information sought by the applicant are available with the PIO, such details may also be provided to the applicant.

3. Contents of this OM may be brought to the notice of all concerned.

K.G.Verma

Director

12. Getting information free of charge [S. 7(5) & (6)]

Section 7(6) of the RTI Act:

7(6) Notwithstanding anything contained in sub-section (5), the person making request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified in sub-section (1).

Major Issues

This is an important clause in the RTI Act for it is supposed to be a powerful incentive for public authorities to supply information within the prescribed time, ordinarily 30 days. Where the information asked for is not available with the receiving PA, the RTI Act obliges the receiving PA to transfer the application to the PA(s) who hold the sought for information, within five days of receiving the request. Information which concerns the life and liberty of a person has to be supplied within 48 hours of the request being received, and where information is sought from security and intelligence organisations that are ordinarily exempt under the RTI Act, because it concerns allegations of human rights violation, then 45 days are allowed for its supply.

Section 7(5) obligates PAs to give the asked for information free of charge to those applicants who are below the poverty line. However, when large volumes of information are involved, this can sometimes be problematic for PIOs.

Section 7(6) obliges PAs, if any of the prescribed time limits are violated, to supply information free of charge. Unfortunately, this is another one of those progressive provisions of the RTI Act that have not yet been properly internalised by the adjudicators. Though cases of delay are very common, there is only one High Court order, and no Supreme Court orders, pertaining to section 7(6). There are many IC orders (over 40% of those analysed as a part of our sample) that allow access to delayed or denied information well after the prescribed time limit, but most of them do not give any directions that the information sought be provided free of cost, given the delay. In some cases, they specifically direct that some or all of the fee should be recovered even though there have been long delays, in direct contravention of section 7(6).

a) Free information to below the poverty line (BPL) applicants

In order to enable the poor and marginalised to exercise their fundamental right to information, the law exempts those living below the poverty line from paying any fee for accessing information. The universal access of the Indian RTI Act, especially for the poor and marginalised, is often held up as one of its major strengths.

b) Free “delayed” information

There was only one High Court order that explicitly dealt with this issue. In **HC-AP O.M. Debara 2014**, the HC held that as the information asked for was not supplied in time, it should be provided free of cost.

“9. Sequel to, Sub-section (6) of this section further posits that notwithstanding anything contained in Sub-section (5), the person making request for the information shall be provided the information free of charge where a public authority fails to comply with the time limited specified in Sub-section (1).

10. As is evident from the record that the Petitioner-SPIO did not comply with the time limits specified in Sub-section (1) of Section 7 of the Act and did not supply the information, despite specific order/ letter (Annexure P3/T) of FAA. In that eventuality, the SIC was within its jurisdiction to direct the Petitioner-SPIO to supply the information free of charges,

vide impugned order (Annexure P10). Therefore, the contrary arguments of learned Counsel for the Petitioner-SPIO "stricto sensu" deserve to be and are hereby repelled under the present set of circumstances."

11. In the circumstances, the order passed by the first respondent is set aside and the respondents are directed to furnish the required information to the petitioner as per the Rules provided under the Act,..."

In about 40% of the appeals coming up before the ICs, the IC either ordered the provision of some or all of the asked for information, or recorded that the information sought had already been supplied in the pendency of the appeal. A second appeal about information not supplied, or a complaint about information that was supplied, or offered to be supplied, after the due date, can only be filed after the time limit for supplying information is over. In each of these cases, information should have been provided free of charge to the applicant. The IC should have ordered so and directed that the application fee, and any other charges collected, be refunded.

In actual fact, in a very large proportion of such cases the IC's order remained silent on the issue and made no mention of either providing information free of charge or of reimbursing the charges already collected. In a few cases, the IC arbitrarily directed that part of the information sought should be provided free of charge and the rest charged for, even though there is no provision in the RTI Act giving the IC or any other authority any discretion in the matter. One such typical order is summarised below.

The CIC directed the BSNL to provide photocopies free of cost only up to 25 pages:

"The Commission directs the CPIO to provide the information as above to the Appellant within 15 days from the date of receipt of this order. He will also permit the appellant to inspect the relevant records and take photocopies/extracts therefrom, free of cost, upto 25 pages." (Emphasis added) **(CIC/ 000293 dated 09.04.2013)**.

In other cases, the IC specifically denied the provision of free information or even specifically ordered charges to be paid, despite the obvious delay and the provisions of section 7(6).

In one appeal, the insistence of the Northern Railways that the applicant pay the charges, even though the PIO had responded asking for money well after the passage of the mandated 30 days, was upheld by the CIC:

"1. 1. The appellant filed an RTI application on 22/5/2012 ...The CPIO responded on 24/7/2012, informing the appellant to deposit a sum of Rs. 280/- so that the information sought could be provided. The FAA responded on 13/8/2012 and upheld the decision of the CPIO. The appellant approached the Commission on 1/11/2012 in a second appeal... 5. The respondent has acted in conformity with the RTI Act. Intervention of the Commission is not required." **(CIC/ 003576 dated 18.03.2014)**

In another case, clearly ignoring section 7(6) of the RTI Act, the CIC ruled,

"After hearing the parties, it is ordered that copies of entire correspondence relating to the allotment of Type III quarter to Shri Dharamvir Singh, LDC may be supplied to the appellant on payment of requisite fee in two weeks time." **(CIC/ 000819 dated 11.07.2013)**

Sometimes spurious reasons, not statutorily authorised, were used to deny applicants the benefit of section 7(6). The law does not allow the charging of an additional fee in order to provide information that might involve a disproportionate diversion of resources. Legally, all that can be done is to provide the information in a form other than what was asked for, if that economises on the use of resources. Nevertheless, the Bihar IC refused to direct that information be provided free of cost to an appellant, who received a response from the PIO after the expiry of time limit prescribed in the RTI Act. The appellant was asked to deposit the fee of Rs. 400 as, according to the IC, giving the information free of cost would cause disproportionate diversion of resources of the PA. **(SIC/BIH/86280 dated 20.12.2013)**

Perhaps one problem faced by public authorities, especially local offices without access to a large imprest account, is that the charges paid by applicants towards photocopying cannot be actually used to pay for the cost of photocopying, for such payments become a part of the government's revenue and as such

go into the consolidated funds of the government. This is a nuance of the Indian accounting system. The PIO has to access local resources to pay for photocopying. The case detailed below outlines the problem, where the PIO did not have the resources or the financial powers, and usually both, to pay for the photocopying. Higher authorities who could have provided and sanctioned the expenditure did not respond in time, and the PIO was stuck with having to provide the information without having the resources to do so, even after recovering the cost!

“The case in brief: A RTI application, dated 10.12.2012 was submitted to the CDPO, Mahamaya ICDS Project seeking the detailed information on the implementation of the different schemes under the project. In response the CDPO asked the RTI applicant on 20.12.2012 to pay an amount of Rs. 66,046/- towards the photocopying cost of 33,023 pages. The applicant then submitted a petition to the CDPO on 24.12.2012 insisting on a specific date on which the information would be furnished on payment of the photocopying cost. Thereafter, he submitted the 1st appeal to the Programme Officer, ICDS, Lower Assam Zone, Kokrajbar on 28.1.2013 and then the second appeal to the Commission on 30.3.2013.

Though the SPIO was not present the Commission decided to proceed with the hearing on the basis of the available records to avoid pending of the case.

The appellant submitted that he was ready to pay the amount of Rs. 66,046/- as asked for towards the photocopying cost, but the Public Authority was not ready to give any money receipt against the amount. He further stated that the Public Authority also could not give any fixed date to furnish the required information. As such the money had not yet been deposited and accordingly the information also had not yet been furnished to him.

Observation

The Commission observed that the entire problem of non-furnishing the information arose for non-payment of the photocopying cost. While the petitioner was correct in insisting on a money receipt against the payment of the amount asked for, the Public Authority was also not in a position to issue a formal Government money receipt, as that will require the amount to be deposited as Government revenue leaving nothing to pay against the photocopying cost unless allotted through budget and released under ceiling. The Commission already took up the issue with the State Government advising them to evolve a system, something like revolving fund, to enable the Public Authority / SPIO to use such amount directly for payment of photocopying cost without depositing as revenue, but there was no response from the Government even after sending reminder. Under the situation the Commission advised the Public Authority i.e. the CDPO, Mahamaya ICDS Project to arrange for furnishing of the photocopies of the documents available with him by paying the amount directly by the applicant to the photocopying firm and then for the documents available with the Anganwadi Centers, the application be transferred to the Anganwadi centers with the advice to furnish the copies of the documents on payment of the photocopying cost directly by the applicant to the photocopying firms. This should be done within a period of 20 days from the date of receipt of this order”. (**SIC/ASS/DHR.7/2013 dated 04.06.2013**)

c) Problems with supplying free information

One common objection by PIOs and PAs to this provision of the RTI Act is that huge amounts of information are sought which cannot possibly be provided in the time available. Consequently, these have to be provided free of charge, with the public authority bearing the cost, including the photocopying cost, causing unnecessary wastage of public funds.

It must be remembered that the Indian RTI Act allows up to 30 days for providing information. Surely any self-respecting public authority could photocopy or print thousands of pages, if that was what was asked for, in 30 days. Besides, it needs to inform the applicant of the amount to be remitted and after that, till the amount is received, the clock stops ticking. So usually the PA gets more than 30 days to respond. Also, as it can charge ₹2 per page, or more, depending on the rules applicable, if the information is despatched in time, this can earn revenue for the PA.

If the records are properly classified and stored, keeping in mind the requirements of the RTI Act, especially as enunciated in section 4(1)(a) of the Act, then 30 days should be more than enough to access and supply information.

The focus should perhaps be on computerisation of records and better record management, which in any case is an obligation under section 4(1)(a) of the RTI, rather than on trying to justify delays in the provision of information.

d) Agenda for action

- i. ICs should order that the charges collected for information that is delayed, or that should otherwise have been provided free of cost, should be reimbursed and the applicant should be compensated.
- ii. But apart from this, a personal penalty should be levied on the concerned PIO. Clearly, recovering fee from applicants even where the law specifies that information should be provided free of cost, is a form of obstruction in the furnishing of information. The ICs should ensure that such a penalty is imposed to discourage PIOs from exploiting applicants and covering up for their own delays.
- iii. The focus should perhaps be on computerisation of records and better record management, which in any case is an obligation under section 4(1)(a) of the RTI Act, rather than on trying to justify delays in the provision of information.
- iv. The government should issue a circular allowing offices to directly use the money paid by the applicant to meet the photocopying costs, perhaps through a revolving fund.

13. Getting information in the form asked for [S. 7(9)]

Section 7(9) of the RTI Act:

7(9) An information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.

Major Issues

This is again an important provision that has not been adequately understood or appreciated by PIOs, public authorities, and adjudicators. The RTI Act defines “information”, in section 2(f), to mean “any material in any form”. It goes on to give an indicative, though not exhaustive, list:

“including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form”.

In section 2(i) it further states that “record” includes:

- “(a) any document, manuscript and file;*
- (b) any microfilm, microfiche and facsimile copy of a document;*
- (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and*
- (d) any other material produced by a computer or any other device;”*

The fact that it uses the word “includes” implies that this is not an exhaustive list and can also include anything else that could be reasonably considered a record.

Further, in section 2(j), "right to information" is defined to include the right to:

- “(i) inspection of work, documents, records;*
- (ii) taking notes, extracts or certified copies of documents or records;*
- (iii) taking certified samples of material;*
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;”*

Consequently, “information” is defined very widely in the RTI Act with few limitations on its scope and application. This makes the right given to the applicant under section 7(9), to receive information in the form in which it is sought, except under two specific circumstances, a very significant right.

Disproportionate diversion of the resources of a public authority is one of the exceptions mentioned in the law, that could justify providing information in a form other than what was asked for. A threat to the safety of the record is the second such exception. Unfortunately, the term “disproportionate diversion” has not been defined in the RTI Act and nor is there a common usage that is generally accepted. This has resulted in arbitrary use of this exception to deny information in the asked for form.

Also, despite the law only permitting this exception to be used for not providing information in the form asked for, but in some other form, increasingly PIOs and ICs have been using this exception to deny information altogether, thereby illegitimately introducing a new exemption in the RTI Act. It often seems to be forgotten that section 7(9) specifically requires information to be “ordinarily” provided in the form asked for. Therefore, there must be “extraordinary” reasons if it has to be provided in a form other than what was asked for.

a) Insisting on inspections

The ICs have the statutory power and obligation to ensure that the provisions of section 7(9) are properly implemented by all public authorities. This is reiterated by the Supreme Court in **SC CBSE 2011**, where it

details and enumerates the various powers of information commissions under section 19(8). Specifically, the SC makes it crystal-clear that the commission is empowered, in fact obligated, to require a public authority to provide information ordinarily in the form asked for, as specified in section 7(9) of the RTI Act.

“36. Section 19(8) of RTI Act has entrusted the Central/State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of section 19(8) refers to six specific powers, to implement the provision of the Act. Sub-clause (i) empowers a Commission to require the public authority to provide access to information if so requested in a particular ‘form’ (that is either as a document, micro film, compact disc, pendrive, etc.). This is to secure compliance with section 7(9) of the Act.”

Despite this, there is an increasing tendency among public information officers to invoke, at the drop of a hat, the “disproportionate diversion of resources” exemption, without giving any justification or even a description of what resources would be used, and why. This has most commonly manifested itself in PIOs insisting that applicants come and inspect documents or records, even when copies have been specifically asked for and complete details of the information being sought have been provided by the applicant. Of the 462 RTI applications filed during the RaaG 2014 study, for nearly 10% the PIO refused to provide the asked for information⁹² and insisted that the applicant personally inspect the records. This was not an option the PIOs legally had the discretion to exercise, especially as many of the applications were sent to PAs and PIOs in other towns, cities, and states.

There could be instances where either the nature of the request, or the manner in which the concerned records are being maintained, is such that an “extraordinary” situation prevails and the PA feels that the provision of information in the form asked for inescapably involves a disproportionate diversion of resources. However, where a specific record has been identified and asked for, or where no such extraordinary circumstances exist, it is a statutory obligation of the PA to locate and provide the information sought in the form in which it was sought. Despite this, in many cases, even the copying of a letter from a file, where the file details, the date, and the letter number are provided, is judged by the PIO to be a disproportionate diversion of resources, without any legally valid justification.

There is an urgent need to draw up detailed norms on what would qualify, perhaps in terms of person hours, a disproportionate diversion of resources⁹³. There should also be an insistence that where this provision is invoked to supply information in a form other than what requested, then a detailed justification must be provided on how this would violate the norms. Also, in determining the alternate form in which the information is sought to be provided, there must also be a consideration for the resources of the applicant, and the applicant can be requested to inspect the documents only in those “extraordinary” circumstances where there is no other way in which the information can be provided without exceeding the prescribed person-hour norms.

It must also be specified that the provisions of section 7(9), in terms of disproportionate diversion of resources, can only be invoked if the PA is in compliance with the legal requirements to properly manage, index and catalogue its records, in conformity with section 4(1)(a) of the RTI Act.

It might here be worth remembering that the right to inspect works, records, or documents is provided to the public under section 2(j)(i) of the RTI Act. Nowhere in the act has the PIO or the public authority been given the right to insist that an applicant come and inspect a record, when they have sought information in some other form. In fact, section 7(9) specifically forbids this. Clearly, the choice is that of the applicant and not that of the PIO.

⁹² P 69, chart 6F, chapter 6, RaaG & CES, 2014, *Op. cit.*

⁹³ The UK Government lays down a limit of 30-40 person hours per application.

Apart from being a violation of section 7(9) of the RTI Act, such practices also violate the general obligation placed on public authorities in section 8 (1) of the RTI Act, where it states “that the information which cannot be denied to the Parliament or the state legislature shall not be denied to any person”. Surely if there is a Parliament question asking for details of a specific document, the Parliament cannot be told that as information is not maintained in this form, or because it will take too much time to search out, members of parliament interested in the information may kindly inspect the concerned files and extract the information for themselves!

Therefore, where information is being refused or not supplied in the form asked for, by invoking section 7(9), it has to be certified by the public authority that they would similarly respond to the Parliament or the legislative assembly, if they had sought such information. Perhaps the requirement to do this, insisted upon by the adjudicators, would ensure that this section does not become another loophole by which information is denied to the people of India. Unfortunately, so far the information commissions are not taking due cognisance of this growing problem.

b) Denying copies of documents

Another puzzling trend among ICs is the inexplicable tendency to allow inspection, but deny copies, of records. As already described above, the definition of “information” and “right to information” is so exhaustive in the RTI Act that where information exists, and is not exempt under the RTI Act, the RTI applicant can legitimately seek it in any form they desire. Nothing in the RTI Act, except section 7(9), curtails the right of the applicant to get information in the form sought. Section 7(9), while reasserting this right also introduces two exceptions, described above.

It follows from this that access to the information sought can be given in a form other than the one that it was sought in, only if the form that it was sought in either disproportionately diverts the resources of the PA or threatens the safety of the record itself. Nevertheless, in many orders ICs have denied the copies sought without giving any reasons or justification, and without there being any reason to believe that either of the two restrictions mentioned in 7(9) apply.

In several cases ICs have ordered full or partial disclosure with the explicit direction that only inspection of records be granted and no copies be provided. In fact, in some cases, the ICs actually directed that no photocopies are to be provided after inspection. The PIOs and ICs in such cases did not record the mitigating circumstances as enumerated in Section 7(9) which could allow information to be provided in a form (inspection) different from the one in which it was originally sought (copies).

In a case where the appellant asked for attested photo copies of the documents submitted by the Maharaj Agrasen Hospital Charitable Trust along with the application for issue of completion certificate, on the grounds that the MCD had leased out a large plot of land to the Trust by charging a small sum as annual lease amount, the CIC ruled:

“After hearing both the parties Commission directs the CPIO to provide opportunity of inspection of the requested documents i.e., application made by the Trust along with all enclosures. During the inspection, appellant will be allowed to take notes but will not be provided with photocopies of the documents.” (CIC/ 002632 dated 19.07.2013)

In another case where an ordinance factory had denied an appellant minutes of a meeting in which 4 orders were finalized, the CIC ruled:

“...the appellant may be given inspection of the requested documents and be permitted to take notes therefrom. It is made clear that he would not be supplied copies of any documents.” (CIC/000730 dated 25.04.2013)

In a similar order where the appellant asked for information on a death claim policy, the CIC ruled:

“After hearing both the parties Commission directs the CPIO to provide opportunity of inspection of the concerned file holding the information sought by the Appellant. CPIO is not required to provide the appellant with copies of documents from these files.” (CIC/002436 dated 04.11.2013)

This is despite the fact that section 2(j) specifically defines the “right to information” to include a right to “extracts or certified copies of documents or records”.

But among all these denials there are occasional denials that demonstrate an innovative application of section 7(9). In one such case (**SIC/ASS/ KP(M)636 dated 20.12.2013**), the Assam SIC held that the SPIO’s refusal under section 7(9) to make copies of 17,280 pages was justified especially as the SPIO took the trouble of bringing all the pages with him from Mumbai, where the SPIO was based, to Guwahati, where the Assam IC was located. This was done so that the applicant could inspect them during the hearing. The efforts of the PIO are commendable, but nevertheless if the information asked for was delayed, it would have had to be provided free of cost. The IC order, at the end, specified that only fifty pages could be given free of cost. It is not clear from where the IC derived the powers to set this limit⁹⁴.

c) Denying information altogether

There has also been a tendency, among PIOs, to totally deny access to information by citing “disproportionate diversion of resources”, *a la* section 7(9). However, section 7(9) nowhere permits the denial of information, if providing it in the form asked for disproportionately diverts the resources of the PA. Section 7(9) seems to say three things.

First, it obliges public authorities to provide information in the form asked for. Second, it then provides for an exception to this rule, where providing it in the form asked for would disproportionately divert the resources of the public authority. But what follows is that, if this exception is satisfied, then it can be provided in a form other than that in which it was sought. For example, if a hard copy of a document is available and the applicant asks for an electronic copy of it, which might be very expensive to make and might require an inordinate amount of human resources, then section 7(9) would allow the PA to provide the hard copy while giving adequate justification for why converting it into an electronic copy would disproportionately divert its resources.

There is no reason whatsoever to assume, given the language of the section, that this provision allows for refusal of the information.

Section 7(9) read with Section 2(j) of the RTI Act makes it clear that ordinarily information should be provided in the form in which it is sought, i.e. inspection, certified copy or in electronic form, unless providing it in such form would disproportionately divert the resources of the public. As discussed above, the use of the word ‘ordinarily’ implies that only under extraordinary circumstances should information not be provided in the form in which it is sought. If information is not provided in the form sought by the applicant, proper reasons must be recorded by the PIO as to how providing it in the form sought would disproportionately divert the resources of the public authority.

Even then, the only concession that S. 7(9) provides is that information may be given in a different form from the one in which it was sought, if the mitigating circumstances described in the section exist.

Interestingly, the DoPT, Government of India also seems to take such view, as expressed in a circular⁹⁵ to all government departments:

“5. ... However, wherever supply of information in a particular form would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the records, the PIO may refuse to supply the information in that form.” (Emphasis added)

⁹⁴ For relevant extract from the IC order, see annexure 7(d).

⁹⁵ N0.12/9/2009-IR dated 24th May, 2010, page 16 of *Compilation of OMs & Notifications on Right to Information Act, 2005*. Op. Cit.

In any case, if this section was intended to provide a further exemption for denying information, then it would not have been a part of section 7, but as a part of section 8 or 9, for that is where all the legal exemptions are located. In fact, section 7(1) of the RTI Act specifically states that a PIO may reject the request for information only on the basis of any of the reasons/grounds specified in sections 8 and 9.

The third point it makes is that there is another exception to the obligation of providing information in the form in which it is sought, and that is if providing it in that form would be “*detrimental to the safety or preservation of the record in question*”. Here, again, and for the reasons enunciated above, the alternative allowed is to provide it in some other form, not to refuse it. So for, example, if someone has asked for a photocopy of an old and fragile page, and if the public authority believes that the act of photocopying the page might damage it, or damage the larger publication it is a part of, the public authority might supply a photograph, or even offer a hand transcript of the contents, as appropriate.

Unfortunately, it is not uncommon for ICs to uphold the use of section 7(9) to deny information, without establishing that there is no form in which the asked for information can be provided without compromising the safety or preservation of the record sought. In fact, ICs do not even explain how providing the information sought in the form that it was being sought in, would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record sought. Therefore, they neither provide a basis for allowing information to be provided in a form different to what it was asked for, nor a justification for the rare, legally valid, denial.

In one such order the CIC held:

“3. It is to be seen here that Section 7(9) of the RTI Act 2005 empowers the CPIO/ APIO to deny the information to the appellant in case the disclosure thereof would disproportionately divert the resources of Public Authority or would be detrimental to the safety or preservation of the record in question.” (CIC/ 0001383 dated 4.8.2015)

As already discussed, such orders are without a legal basis. If providing a large amount of information is the problem faced by the PA due to lack of human/financial resources, the PIO could refer the matter to the relevant senior authority with the requisite powers to approve the financial resources and seek approval to provide the information in a time bound manner. Also, PAs could ensure that officials designated as PIOs have sufficient drawing and disbursing powers to service information requests. PAs could also work out a rate contract with shops providing photocopying services.

i) Collation and compilation of information: If on the other hand the problem faced by the PIO is that the information sought would have to be collated/collected from several files/sources, the legally appropriate response would depend on whether the said information was required to be compiled/collated in any case under any other law/rule or regulation. In case the PA is supposed to, in any case, compile the information, the said information must be compiled and provided to the information seeker. This has been reiterated by the Supreme Court in **SC CBSE 2011**.

Despite this, IC orders continue to accept denial on this basis. In one order the CIC, without giving any reasons or justifications, held:

“The CPIO denied the information to the appellant on the grounds that the information is not easily available and preparation of such details would disproportionately divert bank's useful resources and the same would be detrimental to the safety or preservation of the record in question as per section 7(9) of the RTI Act ... The order of the CPIO is upheld.” (CIC/ 001084 dated 25.07.2013 & similar order in CIC/ 000263 dated 06.05.2013)

In cases where the relevant information is not required to be compiled under any law/rules/regulations, then either the PIO should nevertheless compile it in order to meet the obligations under the RTI Act and supply it to the applicant. However, if the PIO is convinced that such a compilation would disproportionately divert the resources of the PA then, after recording this and the reasons thereof in detail, the PIO could transmit the information to the applicant without further compilation, in the form it is

available. Where the sought for information is held by other officials, the PIO could invoke Section 5(4), and ask them to provide it to the PIO for onward transmission to the RTI applicant, without further compilation. But under no circumstance can such information be totally denied under the RTI Act.

ii) Seeking all relevant records on a specific issue: When a general query is made seeking copies of all records related to a matter, without mentioning details or references of specific records, all documents and records relevant to the matter being enquired about, and not otherwise exempt from disclosure, should be identified and provided. The applicant is, of course, free to further seek to inspect the records and identify anything else they might want, in addition to what has already been supplied.

As the general public is mostly unaware of the reference numbers or technical names of records that pertain to, for example, all the records regarding the rejection of their application to the government on some matter, it is the obligation of the government to identify the related documents and also a statutory responsibility under section 4(1) of the RTI Act to manage and organise records in a manner such that it “facilitates the right to information”. If, as discussed above, there is substantial non-compliance with this provision of the RTI Act, then PAs should not be allowed to invoke the “disproportionate diversion of resources” exception.

Despite this, PIOs continue to illegally distort the role of section 7(9), and ICs continue to uphold these statutory acrobatics. In one case, the CIC accepted the plea of the RBI that that detailed expenditure breakups are not available at the headquarters but only in the fifteen plus regional/branch offices. Therefore, collection and collation of information from these fifteen plus branches would have resulted in disproportionate diversion of resources. The CIC went on to quote an extract from **SC CBSE 2011** where the Supreme Court had rightly held that a public authority was not required to collect and collate information from other public authorities that it did not hold nor was required to hold.

“3. The matter was heard by the Commission. The appellant stated that the year wise expenditure given by the RBI does not give any details of the amounts spent on the particular activities as asked by him but appeared to be the total cost of running the ombudsman’s offices. The respondents stated that they had provided information by collecting it from the Annual Reports submitted by the Banking Ombudsmen and the detailed break up would be available in the regional offices/branch offices. They had provided the expenditure as it was available with them. Besides, as explained by the FAA, collection and collation of information from 15 branch offices and respective regional offices would have resulted in disproportionate diversion of resources.

4. The Commission accepts the submissions of the respondents. The Supreme Court in the case of CBSE vs Aditya Bandhopadhyay has observed as follows :-

““35. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information that is available and existing. This is clear from a combined reading of section 3 and the definitions of ‘information’ and ‘right to information’ under clauses (f) and (j) of section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non available information and then furnish it to an applicant.....”

“5. In view of the above, the decision of the FAA is upheld. The appeal is disposed of.” (CIC/ 000873 dated 27.1.2016)

But then the CIC chose to ignore the facts that the information being asked for was not being held by any other public authority but by branches of the RBI itself, that detailed expenditure breakups were required by law to be maintained, and that all it would have taken was one email to get copies of them, using the powers that the PIO has under section S. 5(4) and seeking the assistance of other officers. At best, 7(9)

could have been invoked to refuse to collate this information and just pass it on to the applicant in the form that it was received from the branch offices. Besides, access to detailed statements of expenditure is a very basic requirement for achieving public accountability, which is one of the avowed objectives of the RTI Act.

In another case related to the RBI, where an applicant asked for the minutes of meetings of the central boards of the RBI, the CIC held:

“12. The approach of the RBI is that 'information' as defined in section 2(f) of the Act is the 'material' held in any 'form', and that the appellant cannot vaguely seek the minutes of meetings, but must seek the material that may be held in any form. According to the RBI, the appellant has not specified the 'material', i.e., the 'information' required with reference to the subject matter. Unless the RTI application was clear enough to identify the information required, the request made is defective and the public authority cannot be required to provide the information without knowing what information was sought.

13. The RBI said that a very large number of meetings of the Central Board and Committee of Central Boards were held in a year, with the result that acting on the RTI application would imply disproportionately diverting the scarce resources of RBI, which the RTI Act's section 7(9) seeks to prevent. It was stated that the minutes of the various Board meetings constitutes voluminous documentation and files spread over several RBI departments. It was said that the task of screening and compilation would be extremely laborious and time consuming, hence the cover of section 7(9) of the Act was claimed.

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15. The point was raised that any direction to disclose the minutes, wherein the members of the Board/ Committees discuss various sensitive matters, would hamper free and frank exchange of views within the institution, which would affect effective supervision and be detrimental to the interests of the banking system.”

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“31. The situation in this case is that collection and collation of the information sought would entail disproportionate diversion of the resources of the public authority. Section 7(9) of the RTI Act seeks to prevent this. It is with this purpose that the FAA has cited section 7(9) in his order.

32. There is no apparently sufficient reason to interfere with the operational part of the FAA's order, which asks the RTI applicant to seek specific information rather than information considered to be in the nature of “fishing and roving” information and enquiries. Actually, the FAA's order directing the RTI applicant towards specificity should not be perceived as adverse to the interests of the information seeker.

Decision

33. What follows from the above discussions and observations is that section 7(9) of the RTI Act applies in the present case because the information being sought is such which would disproportionately divert the resources of the RBI. In this context, the decision of the FAA dated 25.10.2011 is upheld to the extent that it urges the RTI applicant to identify the specific information being sought.” (CIC/ 003606 dated 4.10.2013)

The CIC surprisingly accepted their contention that “minutes of the various Board meetings constitutes voluminous documentation and files spread over several RBI departments”. The fact that these minutes are statutorily required to be circulated to all members of the board, and to many others besides, and that therefore they must be available in a compiled form and, in this day and age, most likely maintained electronically, requiring little effort to find, seems to have escaped the CIC. Even more amazing was the contention of the RBI that the applicant, instead of asking for the minutes, should specify the subject matter on which he required information.

Consider that if he had asked for all the discussions and decisions, in the minutes, relating say to bad debts of banks, then the RBI would most likely have, and with far more justification, responded by saying that they do not maintain information in such form, but only in the form of minutes, and therefore would refuse to compile the asked for information, invoking section 7(9). So either way the applicant would have lost!

In another similar matter, an applicant was refused details of the travel and leave travel concession expenditure incurred by the chairman and managing director (CMD) of a bank over a period of a little over a year.

“This matter pertains to an RTI application dated 9.7.2013 filed by the Appellant, seeking information on five points regarding TA and DA / LTC bills claimed by CMD of the bank from 1.4.2012 till date of the RTI application along with supportive vouchers.

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4. Having considered the records and the submissions made before us by both the parties, we note that the Appellant had sought information from 1.4.2012 till the date of the RTI application, which is indeed voluminous and would disproportionately divert the resources of the public authority from its day to day work. At the same time, in the interest of transparency, we would like to give the Appellant access to information for a limited period. The Appellant may choose any period of one month from 1.4.2012 to 9.7.2013 (date of his RTI) and convey the same to the CPIO. In the event of his doing so, the CPIO is directed to provide him copies of TA bills / LTC bills, along with supportive vouchers, for the month so chosen, on payment of the prescribed photocopying charges. In respect of the LTC bills, personal information such as details of family members etc. should be deleted. The CPIO is further directed to provide information as above, within thirty working days of receiving from the Appellant intimation regarding the month chosen by him, under intimation to the Commission.” (CIC/ 000018 dated 21.11.2014)

Clearly this information is required to be compiled and maintained under law as it has to be audited. Besides, as discussed earlier, access to such information is the bedrock of public accountability. Yet the CIC thought it fit to allow the PA to get away with the vague excuse that providing details of the CMDs travel expenses would disproportionately divert their resources, even though such information needed to be compiled to present for audit, was being held by the PA, and was not otherwise exempt. What is worse is that the CIC finally decides to allow the applicant information pertaining to one month, without even indicating where it derives the power to so abbreviate a request.

In short, either all information asked for should have been provided to the applicant, if it was not exempt. The PIO should have been penalised and the information should have been provided free of charge. Alternatively, if it was considered exempt (which in fact it was not), it should not have been provided. As it is, the order is like a benign dispensation where the applicant is being told that though you are not entitled to the asked for information, the CIC will allow you a little bit, never mind the absence of any such discretionary powers in the law, but you will have to pay for it, never mind section 7(6) of the RTI Act.

Another case dealt with information being sought from the Life Insurance Corporation. The LIC had refused the information claiming that in their “*e feap system*”, whatever that might be, they did not have the “*facility of extraction of information in case of terminated agents.*”

“4. The matter was heard by the Commission. The appellant submitted that he was an agent of the LIC and his agency had been terminated by the respondent without giving him any prior intimation. He also submitted that he had already challenged his illegal termination in the Hon’ble High Court of Orissa at Cuttack. He sought information regarding the benefits which he ought to have received on the basis of his previous agency but he didn’t get satisfactory information from the respondents.

5. The respondent submitted that in e feap system (the system in which they maintain information regarding policies) they do not have the facility of extraction of information in case of terminated agents. They keep their records policy wise and if the appellant provides the policy details to them then they may be able to furnish the information subject to the RTI provisions. He also submitted that attempting to collect the information sought for a terminated agent would require lot of manpower resources which was also exempt under section 7(9) of the RTI Act.

6. The Commission accepts the submissions made by the respondents that they did not have the information sought by the appellant in their computerized information system. The appeal is disposed of”. (CIC/002558 dated 17.9.2014)

The order contains no explanation of what an “e feap” system was, why information regarding a terminated agent could not be extracted from it, and why then was it permissible to use such a system to store the information that was clearly under the control of the PA. There was no independent expert testimony certifying that the asked for information cannot be extracted from an “e feap” system, or that extracting it would “disproportionately divert” the resources of the PA. Surprisingly, the LIC conceded that if the applicant gave them his policy details then they “may” be able to supply the asked for information.

Also, though the applicant applied for the required information on 16th July 2013, and received a denial from both the PIO and the first appellate authority, neither of them thought it fit to request him to send his policy details so that they “may” provide him the asked for information. It was only over a year later, in September 2014, that as a part of the second appeal process this offer was made. Surely this at the very least required the CIC to take cognisance of the offer and direct that the details be provided and consequently the asked for information provided. Instead, the CIC chose to ignore this and went on to dispose of the appeal by accepting that “*submissions made by the respondents that they did not have the information sought by the appellant in their computerized information system*”, even though the respondents never claimed that!

d) Agenda for action

- i. Considering widespread and illegal use of section 7(9) to deny information and to harass the applicant, and the complicity of most ICs in this matter, this is a fit issue on which the Supreme Court should be moved to get a definitive ruling on what qualifies to be “disproportionate diversion of resources”. Perhaps one way to do this would be to prescribe that only if the supply of information in the form asked for requires more than a certain number of person hours, could it be provided in a form other than what was asked for. As an example, the FoIA and the Data Protection Act of UK prescribe 40 person hours as the accepted limit, per request.
- ii. Further, a ruling should be solicited that such “diversion” only entitles you to give the information in some other form and that, in any case, you cannot deny information citing section 7(9).
- iii. Further, the PA can only resort to the “disproportionate diversion of resources” plea if it is properly maintaining, cataloguing, and indexing its records, in accordance with section 4(1)(a). It must be ensured that where records are not properly managed, the PA must invest whatever time and resources it takes to provide the asked for information in the form asked for, for this would give a strong incentive to the PA to organise its information better, in accordance with S. 4(1).
- iv. A public authority must be required to give, in writing, a detailed justification on how, even after taking the steps described above, it would still involve a disproportionate diversion of resources if it provided information in the form asked for. And as clarified, 7(9) can only be used to provide info in a different form, not out rightly deny it.
- v. In seeking a definition of “disproportionate diversion of resources”, the SC must be reminded that it itself has held that the right to information is a fundamental right and, therefore, any curbs on a fundamental right must only be allowed in exceptional circumstances.
- vi. Pending a Supreme Court directive, information commissions, who are empowered to issue necessary directions under section 19(8), must use their powers to clarify the correct use of section 7(9) and to proactively ensure that the practices of PAs in managing and storing information are conducive to the quick identification and access of specific records or bits of information sought under the RTI Act. The ICs could also invoke the obligations of the PA listed under section 4(1)(a).
- vii. In no case should section 7(9) be allowed to apply to information that should have been proactively disclosed under section 4, but had not been disclosed at all, or not effectively and in a manner that was accessible to all.

PART IV. EXEMPTIONS

14. Prejudicially affecting national interests or inciting an offence [S. 8(1)(a)]

Section 8(1)(a) of the RTI Act:

*“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;”*

Major Issues

Section 8(1)(a) contains very basic exemptions which collectively cover many of the possible adverse impacts that transparency could have on the country, both internally and in its relations with other countries. Somewhat as an anti-climax, it also exempts from disclosure any information that might “lead to incitement of offence”. The one thing that most of the exemptions enumerated in section 8(1)(a) share is that they are formulated very generally, mostly without precise definitions. Therefore, specific applicability depends on how PIOs and adjudicators define these terms. “Sovereignty” and “integrity” are overarching terms that can have very varied and wide usages, and often incite emotive responses, as has been seen in the recent debates on sedition. Similarly, what could prejudicially affect the security, strategic, scientific or economic interest of the state is mostly anybody’s guess.

Therefore, it becomes all the more difficult to challenge their invocation with respect to information that public authorities might like to keep under wraps. Fortunately, as many of these terms are also found in article 19(2) of the Constitution, there is a fair amount of legal debate on their general meaning and applicability.

a) Security

In this day and age, especially in India, security is a major preoccupation of governments and people alike. More than most other things, we want to be physically and economically secure in our homes and work places, on the streets and in our villages, towns and cities. Undoubtedly, there are many genuine threats to our security, whether they be external threats from neighbouring countries, or internal ones from terrorists, insurgents, and other lawless elements. Added to that, our security is threatened by potential natural disasters, like floods and earthquakes, and even by bacteria and viruses. Therefore, we are willing to put up with many indignities and discomforts, including tedious security checks and extensive restrictions.

There is often a tendency for governments, especially security agencies, to play up this threat perception and to assume powers and immunities that should never be tolerated in democracies and in free societies. An example of such almost unquestioning empowerment of security forces could be seen in one order, ***HC-DEL Ajay Madhusudan Marathe 2013***, where the Delhi High Court upheld the exemption claimed under this clause of the RTI Act. In its order, the HC exempted from disclosure the copy of a letter and other documents regarding a complaint by the Chief Minister of Jammu and Kashmir on the reaction of the Army to his remarks against the deployment of troops in Jammu and Kashmir.

*“7. I have heard the learned counsel for the petitioner. The information sought pertains to a correspondence which emanated apparently from the Chief Minister of J and K, Sh. Omar Abdullah to the Prime Minister of India. Even according to the petitioner, the said letter pertains to the issue of deployment of defence forces in the State of J and K. There is no gain saying that J and K is a *sugeneris* State within the Union of India in respect of which the respondents would exchange*

information with State authorities from time having security implications. The background circumstances do point to the fact that the area in respect of which information is sought, could have security implications. The judgment in this regard is best left to the wisdom of the agencies concerned, who are tasked with the responsibility of sifting such information and thereafter arriving at a conclusion one way or the other. In this particular case, the respondents have come to a conclusion that the information sought has security implications. In the absence of any material to the contrary, this court would be slow to interfere with the decision arrived at in that behalf.

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"11. The factum of existence of an organisation such as the National Security Establishment or National Secret Establishment is neither here nor there. What is important is that inputs have been received from the necessary sources which seem to suggest that divulging information qua the queries raised by the petitioner would affect the security interest of the country is: in my view good enough to decline information to the petitioner in terms of the provisions of Section 8(1)(a) of the RTI Act."

Unfortunately, the reasoning given in the high court order, where the application of section 8 (1) (a) is upheld, is not without controversy. In the order relating to the letter by the Jammu and Kashmir Chief Minister, the court gives as the basis of its decision the reason that "*the area in respect of which information is sought, could have security implications. The judgement in this regard is best left to the wisdom of the agencies concerned...*". This seems an unacceptable stand as it would mean that no questions can be raised by the information commissions or the high courts about decisions made by dealing agencies if these matters allegedly have a bearing on security issues. It is doubtful whether such a position would be acceptable either to Parliament or even to the Supreme Court and other high courts.

Fortunately, in ***SC Extra Judicial Execution Victim Families Association 2016***, the Supreme Court seems to take a contrary view. Though the issue involved is not the provision of information but the determination of liability in allegedly extra-judicial killings, the general principle reiterated is that the security forces, even when there are security threats and the promulgation of the Armed Forces Special Powers Act, cannot be beyond question and beyond judicial scrutiny for their actions and decisions. Though this is an interim order, unless it is specifically revoked by the SC, it has the force of law.

b) Economic interests

There has been a tendency to invoke potential harm to national economic interests any time information is sought that might expose wrong doings in the financial sector or in economic ministries. The reasoning that is offered is that any embarrassment to, or dislocation of, the financial sector is not in the interest of economic growth and public confidence.

In this context, the Supreme Court's order, relating to information about banks held by the Reserve Bank of India, is very relevant. It not only categorically and forcefully rejects the oft repeated contention that the economic interests of India would be better served by heightened secrecy, but correctly asserts the opposite, stating that such secrecy would actually harm the economic interests of the country.

In ***SC RBI 2015***, the SC examined the issue of whether disclosure of inspection reports and other information about the performance of banks in India would pose a threat to the economic interests of India. The SC strongly rubbished this contention and argued, on the contrary, that making the asked for information public was very much in keeping with the economic interests of the nation, and any suppression of such information would be a threat to the Indian economy.

The SC went on to hold that economic interests were a part of larger national interests, and included, as an objective, the economic empowerment of the citizens. This could be achieved through making information available to the people.

“61. The baseless and unsubstantiated argument of the RBI that the disclosure would hurt the economic interest of the country is totally misconceived. In the impugned order, the CIC has given several reasons to state why the disclosure of the information sought by the Respondents would hugely serve public interest, and non-disclosure would be significantly detrimental to public interest and not in the economic interest of India. RBI's argument that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country's economic security would be endangered, is not only absurd but is equally misconceived and baseless.”

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“69. We have surmised that many Financial Institutions have resorted to such acts which are neither clean nor transparent. The RBI in association with them has been trying to cover up their acts from public scrutiny. It is the responsibility of the RBI to take rigid action against those Banks which have been practicing disreputable business practices.

70. From the past we have also come across financial institutions which have tried to defraud the public. These acts are neither in the best interests of the Country nor in the interests of citizens. To our surprise, the RBI as a Watch Dog should have been more dedicated towards disclosing information to the general public under the Right to Information Act.”

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72. It was also contended by learned senior Counsel for the RBI that disclosure of information sought for will also go against the economic interest of the nation. The submission is wholly misconceived.

73. Economic interest of a nation in most common parlance are the goals which a nation wants to attain to fulfil its national objectives. It is the part of our national interest, meaning thereby national interest can't be seen with the spectacles(glasses) devoid of economic interest.

74. It includes in its ambit a wide range of economic transactions or economic activities necessary and beneficial to attain the goals of a nation, which definitely includes as an objective economic empowerment of its citizens. It has been recognized and understood without any doubt now that one of the tool to attain this goal is to make information available to people. Because an informed citizen has the capacity to reasoned action and also to evaluate the actions of the legislature and executives, which is very important in a participative democracy and this will serve the nation's interest better which as stated above also includes its economic interests. Recognizing the significance of this tool it has not only been made one of the fundamental rights Under Article 19 of the Constitution but also a Central Act has been brought into effect on 12th October 2005 as the Right to Information Act, 2005.” (SC RBI 2015)

In another order, **HC-DEL Joginder Pal Gulati 2013**, the Delhi High Court similarly held that guidelines related to how the income tax department selects tax payers for scrutiny cannot be considered to be exempt under section 8(1)(a), as wrongly held by the CIC, since the disclosure of this information cannot possibly threaten the economic security of India.

“6.3. There is no definition of the expression "economic interest" in the RTI Act. As is ordinarily understood, the term economic would mean connected with or related to the economy. Economy would generally relate to aspects of wealth and resources of the country, its production, consumption and distribution. The term wealth, would include, I take it, the financial resources of the country. While the term "interest" in the context of the RTI would mean financial stake. (See Concise Oxford Dictionary 9th Edition Pages 429-430 and Page 710).

6.4. The expression, economic interest, thus takes within its sweep matters which operate at a macro level and not at an individual, i.e., micro level. In my view, by no stretch of imagination can scrutiny guidelines impact economic interest of the country. These guidelines are issued to prevent harassment to assessee generally. It is not as if, de hors the scrutiny guidelines, the I.T. Department cannot take up a case for scrutiny, if otherwise, invested with jurisdiction, in that behalf. This is an information which has always been in public realm, and therefore, there is no reason, why the respondents should keep it away from the public at large. Thus, in my opinion, provisions of Section 8(1)(a) of the RTI Act would have no applicability in the instant case.”

c) Incitement of an offence

Though not as sweeping as the other exemptions in section 8(1)(a), even in its specificity it is difficult to determine what information, and under what circumstances, could incite an offence. The primary responsibility should be of those who get incited, to control themselves, rather than for heightened secrecy. However, sometimes in tense social situations it might be desirable to withhold some information, at least while tensions are running high, in order to prevent the loss of life or threat to the physical well-being of innocent people. Therefore, in a city where communal riots are raging it would seem sensible to withhold certain information, for instance about desecration of a religious monument, or details of where people are given refuge, or of violence between warring communities. In short, there has to be significant public interest and a strong possibility of such interest being harmed, to justify secrecy.

Though this does not appear to be an oft used exemption, one interesting discussion is contained in ***HC-BOM Shonkh Technology International Ltd.2011***, wherein the High Court allowed access to details of the agreement between private parties and the government on registration of vehicles and issuing of driving licences. The HC rejected the claim that the disclosure of such information could lead to the incitement of an offence. Interestingly, though the HC rejected the plea of the government (petitioner) that “*the absence of the consideration of larger public interest in Clause (a) of Sub-section (1) of Section 8 is a material and relevant aspect in this matter*”, it did not point out that section 8(2) brought in the consideration of public interest for all the clauses in section 8(1), including this one (See chapter 21 for more details).

“13. I am not in agreement with Mr. Manohar that the absence of the consideration of larger public interest in Clause (a) of Sub-section (1) of Section 8 is a material and relevant aspect in this matter. This is not a case where Clause (a) has been relied upon by anybody or could be relied upon in the given facts and circumstances. On point No. 5, the disclosure and the information sought was with regard to execution of any contract with a private service provider for providing the driving licence smart cards, optical smart cards and registration certificate smart cards. The details of such contracts and the copies thereof were sought by the Respondent No. 4. By seeking such information and without anything more, a conclusion cannot be reached that this would lead to incitement of an offence. Therefore, this is not a case where Clause (a) was in any way applicable. The information was not of the nature contemplated in Clause (a) at all.”

d) Agenda for action

- i. Given the vagueness and potential universal applicability of most of the exemptions listed in this section, it is necessary that both the disclosure to Parliament overrides, and the public interest overrides, contained in sections 8(1) and 8(2) respectively, be vigorously applied by commissions every time information is sought to be denied under one of these heads.
- ii. There is also urgent need to get some progressive judicial interventions delimiting and qualifying the use of this section.

15. Commercial & trade interests, & intellectual property [S. 8(1)(d) & 9]

Sections 8(1)(d) & 9 of the RTI Act:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

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“(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;”

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“9. Without prejudice to the provisions of section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.”

Major Issues

The RTI Act rightly protects commercial and trade interests and intellectual property, but only in so far as it does not clash with “larger public interest”. Also, it gives further protection to copyrighted material by removing it from the public interest test of both section 8(1)(d) and section 8(2), by reiterating in section 9 that the PIO “may” reject a request which required infringement of copyright. However, it does not specify under what conditions the PIO may reject such a request, nor does it say “shall reject”, leaving it entirely to the discretion of the PIO. It does, though, specify that this does not apply to copyright subsisting in the state. In other words, as far as the RTI Act is concerned, the restrictions on copying etc. laid down in the Copyright Act do not apply to government documents or to any material for which the copyright vests with the government.

a) Time-frame of exemptions

The SC, in **SC ICAI 2011**, held that information relating to question papers etc. can only adversely affect the competitive position of third parties if it was disclosed before the exams, but that there is no adverse impact after the examinations and therefore there is no barrier to disclosure. The question was whether question papers, solutions/model answers and instructions, with regard to any examination, are forever banned from disclosure or is their exemption from disclosure time bound and after the critical period is over, they can come into the public domain.

In general, the SC held that what is exempt at one time need not be exempt for all time to come. The SC mentioned section 8(3) which removed many of the exemptions available for withholding information, once that information was more than twenty years old.

“12. Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. For example, any information which is exempted from disclosure under section 8, is liable to be disclosed if the application is made in regard to the occurrence or event which took place or occurred or happened twenty years prior to the date of the request, vide section 8(3) of the RTI Act. In other words, information which was exempted from disclosure, if an application is made within twenty years of the occurrence, may not be exempted if the application is made after twenty years...

Similarly, if information relating to the intellectual property, that is the question papers, solutions/model answers and instructions, in regard to any particular examination conducted by the appellant cannot be disclosed before the examination is held, as it would harm the competitive position of innumerable third parties who are taking the said examination. Therefore it is obvious that the appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held. Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held. In fact the question papers are disclosed to everyone at the time of examination. The appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year, after the examination. Therefore section 8(1)(d) of the RTI Act does not bar or prohibit the disclosure of question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answer-scripts is completed, as at that stage they will not harm the competitive position of any third party. We therefore reject the contention of the appellant that if an information is exempt at any given point of time, it continues to be exempt for all time to come."

b) Harming competitive position

In **SC RBI 2015**, arguments were made that if information regarding banks, especially information disclosing their lapses and weaknesses, is made public, then it would harm their competitive position. Though the SC order did not directly address the issue of harming competitive position, it stated that it agreed with the conclusion that the CIC had come to, that these arguments were "*totally misconceived in facts and in law*". The SC went on to uphold the CIC's order that the asked for information does not deserve exemption under 8(1)(d).

"45. In T.C. No. 95 of 2015, the RTI applicant therein Mr. Subhash Chandra Agrawal had asked about the details of the show cause notices and fines imposed by the RBI on various banks. The RBI resisted the disclosure of the information claiming exemption Under Section 8(1)(a),(d) and 8(1) (e) of the RTI Act on the ground that disclosure would affect the economic interest of the country, the competitive position of the banks and that the information has been received by RBI in fiduciary capacity. The CIC, herein also, found these arguments made by RBI to be totally misconceived in facts and in law and held that the disclosure would be in public interest."

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"82. We have, therefore, given our anxious consideration to the matter and came to the conclusion that the Central Information Commissioner has passed the impugned orders giving valid reasons and the said orders, therefore, need no interference by this Court."

Perhaps in the **SC RBI 2015** order there was scope for stressing that, where the competitive position is sought to be protected by withholding information that clearly reflects poorly on the functioning of the third party, then it is not only illegitimate but actually fraudulent. If it protects the competitive advantage of the third party, it does this at the cost of public interest. Though the SC has made strong statements about the obligation that the RBI has towards the people of India, far beyond what it could possibly have towards the banks that it has a relationship with, the explicit enunciation of the underlying universal principle will have to await another progressive order.

c) Priced publications

There have been frequent denials by PIOs, usually upheld by the ICs, for supplying photocopies of priced publications, under the RTI Act. This is despite the fact that there is no bar in the RTI Act for supplying photocopies of priced publications that are not protected under copyright laws, or whose copyright is held

by the government. In fact, section 7(9) would require that if the applicant prefers to get a photocopy rather than purchase the original, this must be provided.

Where the publication involved is copyrighted to a non-state entity, the provisions of the Copyright Act could apply, at the discretion of the PIO. The prevailing laws usually allow a certain proportion of the publication to be copied, and puts restrictions on its use. Unfortunately, so far there is no judicial order reiterating this, though there are many IC orders to the contrary. A typical order is extracted below:

“We have checked the Supreme Court website ourselves and find the specific documents which the Appellant wants available there under the link publications. Therefore, the Appellant can access these documents by visiting the Supreme Court of India website. If he wants the books, he can also purchase those from any standard law book store since these are priced publications. In view of this we are not inclined to direct the CPIO to provide the copies of these books to him separately..” (CIC/000269 dated 10.07.2013).

d) Agenda for action

- i. Whereas the protection given to commercial and trade interests, and to others that harm the competitive position of a third party, is legitimate, each time it is invoked the PIOs and adjudicators must vigorously apply the public interest test, as mandated by law.
- ii. The ICs should require the government to issue a circular to all PAs, clarifying that all priced publications are accessible under the RTI Act, subject to provisions of section 9.
- iii. ICs must consider denial of priced publications, without adequate reasons, as an illegal denial of information, and impose penalty accordingly.

16. Unravelling fiduciary relationships: S. 8(1)(e)

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, —

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(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;”

Major Issues

Exercising their various jurisdictions, the adjudicators examined in detail what qualifies to be called a fiduciary relationship, and what information such a relationship exempts from disclosure.

The six Supreme Court orders on potential exemptions under section 8(1)(e) focussed on information related to two issues. The first was information related to examinations and selections that was exempt because it was held in a fiduciary capacity (*SC ICAI 2011, SC CBSE 2011, SC KPSC 2016, SC Bihar PSC 2012, SC UPSC 2013*), and the second was information related to banking (*SC RBI 2015*).

High courts, apart from these two issues, also considered whether the fiduciary relationship exemption was applicable to communications between the President of India and a state governor, and on sharing remarks made by an officer on the performance of a subordinate.

a) Defining and interpreting “fiduciary”

As per common usage, the term “fiduciary relationship” is understood to mean a relationship where party A gives some information to party B such that the following conditions are met:

- a) The information so given is “confidential” in the sense that it is not in the public domain;
- b) This information is given voluntarily by A and not as a result of any legal or binding obligation;
- c) The information is given “in trust” so that it can only be used, or communicated to others, for the furtherance of the interests of party A, and usually only after party A has agreed to such use or communication;

Examples of such relationships include relationships with a doctor, with whom a person might share personal medical information with the objective of facilitating better diagnosis and treatment. Similarly, one might share private information with one’s lawyer, or accountant, or banker, or therapist, or even one’s priest, such that it is not publicly known, would not have ordinarily been shared with these persons but for the professional function they were expected to perform, and is shared with the trust that it will be used for the benefit of the patient, the client, or the “confessor”.

Any understanding of “fiduciary relationships” with respect to the RTI Act would essentially be more restrictive. For one, only those types of information would be recognised to be confidential and therefore qualified to be held in a fiduciary capacity, that were exempt from disclosure under the RTI Act, and under the conditions laid down under the RTI Act.

So, for example, whereas private information is exempt from disclosure under section 8(1)(j) of the RTI Act, it would be maintainable in a fiduciary relationship. Similarly, information that might “prejudicially affect the sovereignty and integrity of India” or “lead to incitement of an offence” [S. 8(1)(a)]; information “including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party” [S. 8(1)(d)]; “information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes [S. 8(1)(g)], and other such, could also be held in a fiduciary relationship.

Nevertheless, the specific public interest override, and the general override in section 8(2), would be applicable. Therefore, if a situation arises where “public interest in disclosure outweighs the harm to the protected interests”, then this information would no longer have the protection ordinarily accorded in a fiduciary relationship. So also with the override that what cannot be refused to Parliament or a state legislature cannot be refused to an RTI applicant [S. 8(1)].

However, as the RTI Act is only applicable to information held by public authorities, or by private parties that can be accessed under some law by a public authority [S. 2(f)], much of the information being held by PAs, or accessible to them, would be such that it has been provided or accessed under some law or rule, and not voluntarily given. Therefore, following from condition b) mentioned above, as it has not been voluntarily given (like for example volunteering medical history in a government hospital), it would be eligible to be considered as being held in a fiduciary relationship.

To sum up, only that information can be held in a fiduciary relationship, for the purposes of the RTI Act, which is ordinarily exempt from disclosure under the RTI Act, is given voluntarily to a PA and not as a part of a legal or regulatory requirement, and where the public interest in its disclosure does not outweigh the harm to the protected interest. Clearly, very little can thus be exempt under the fiduciary clause of the RTI Act, and in any case whatever is exempt under this clause must already be exempt under some other provision of the RTI Act.

Nevertheless, the fiduciary exemption is one of the most commonly cited exemptions, and has come up before the Supreme Court in at least six separate matters. Despite this, there remains a lack of clarity about what exactly the Supreme Court means by a fiduciary relationship. Extracts from SC orders, containing elements of a definition, are reproduced in BOX 9.

BOX 9

Extracts of SC orders containing elements of a definition of “fiduciary

- “21. The term ‘fiduciary’ refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. ...The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary.” **(SC CBSE 2011)**
- “22..... But the words ‘information available to a person in his fiduciary relationship’ are used in section 8(1)(e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary..” **(SC CBSE 2011)**
- “17...that information under this head is nothing but information in trust, which, but for the relationship would not have been conveyed or known to the person concerned.” **(Kerala HC as quoted in SC KPSC 2016, para 7).**
- “9. In the present case, the PSC has taken upon itself in appointing the examiners to evaluate the answer papers and as such, the PSC and examiners stand in a principal-agent relationship. Here the PSC in the shoes of a Principal has entrusted the task of evaluating the answer papers to the Examiners. Consequently, Examiners in the position of agents are bound to evaluate the answer papers as per the instructions given by the PSC. As a result, a fiduciary relationship is established between the PSC and the Examiners”. **(SC KPSC 2016)**
- “26... On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body.” **(SC CBSE 2011)**

Box 9 contd...

- “16... The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence. The examiners and moderators are required to maintain absolute secrecy and cannot disclose the answer scripts, the evaluation of answer scripts, the instructions of ICAI and the solutions to questions made available by ICAI, to anyone. The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information... When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a fiduciary relationship.” (SC ICAI 2011)
- “79...The CIC in the impugned order has rightly observed as under:
“I wish government and its instrumentalities would remember that all information held by them is owned by citizens, who are sovereign...” (SC RBI 2015)
- “56. The scope of the fiduciary relationship consists of the following rules:
 - (i) No Conflict rule-A fiduciary must not place himself in a position where his own interests conflicts with that of his customer or the beneficiary. There must be "real sensible possibility of conflict. (sic)
 - (ii) No profit rule-a fiduciary must not profit from his position at the expense of his customer, the beneficiary;
 - (iii) Undivided loyalty rule-a fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs
 - (iv) Duty of confidentiality-a fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person. (SC RBI 2015)

And, most importantly:

- “62. The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship. As in the instant case, the Financial institutions have an obligation to provide all the information to the RBI and such an information shared under an obligation/ duty cannot be considered to come under the purview of being shared in fiduciary relationship. One of the main characteristic of a Fiduciary relationship is "Trust and Confidence". Something that RBI and the Banks lack between them. (SC RBI 2015) (emphasis added)
- “60. RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the Respondents herein.” (SC RBI 2015) (Emphasis added)

In the SC orders quoted in the box, there are multiple interpretations of the term “fiduciary”. The intention here is not to impose another definition of the term, over that of the Supreme Court. The purpose is to start a public debate, based on the varied wisdom provided by the Supreme Court and various high courts, to evolve a clear and definitive understanding of what a fiduciary relationship means and what its applicability and scope is, with reference to the RTI Act.

In **SC CBSE 2011**, the SC dealt with the question of whether information relating to the evaluation of answer-sheets was held in a fiduciary relationship by the examining body and thereby exempt from disclosure. In its order the SC stated, among other things, that:

“26... the examining body is the ‘principal’ and the examiner is the agent entrusted with the work, that is, evaluation of answerbooks. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner. On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him... Therefore it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner.

27. *We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books.*”

The SC concluded that since information was not held by the examining body in a fiduciary relationship, the exemption under section 8(1)(e) was not available to examining bodies with regard to evaluated answer-books.

In **SC ICAI 2011**, the SC upheld the denial of information regarding instructions, and regarding solutions to questions, made available by examining bodies to examiners. The SC held that since such information was provided by the examining body to the examiner in a fiduciary relationship, it was exempt from disclosure. The SC went on to explain that if information is given to someone in confidence, then the person or authority who gives such information is also bound to keep it confidential⁹⁶.

In a similar ruling, in **SC KPSC, 2016**, the Supreme Court held that since the KPSC appointed the examiners to evaluate answer papers, the KPSC and examiners were in a principal-agent relationship and a fiduciary relationship existed between them. Therefore, any information shared between them was not liable to be disclosed, unless larger public interest was at stake.

Considering the concept of “confidentiality” is central to the notion of “fiduciary”, in order to properly understand fiduciary, we have to understand what the term confidential means in relation to the RTI Act. As things stand, official documents are classified as confidential, secret, or top secret in accordance with protocols laid down in the *Manual of Departmental Security Instructions*,⁹⁷ issued and periodically updated by the Ministry of Home Affairs, Government of India. The unauthorised disclosure of classified information is punishable under the Official Secrets Act, 1923. In addition, the unauthorized sharing of any official document is restricted under various services conduct rules⁹⁸. However, these classifications and rules are not applicable when information is accessed under the RTI Act and only that information can be exempt from disclosure which is exempt under the RTI Act.

Specifically, the terms “confidential” and “secret” are, for all practical purposes, irrelevant to the RTI Act, which itself specifies (sections 8 and 9) what information can be disclosed and what is exempt from disclosure. Section 22 of the RTI Act makes this redefinition universally applicable:

“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act”.

Consequently, when the SC, in **SC ICAI 2013**, states that: “... *anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship... and therefore exempted from disclosure ...*” it can only be understood to mean that any information, that is exempt under section 8 or 9 of the RTI Act, given or taken in confidence by a public authority, expecting confidentiality to be maintained, will be information available to a person in a fiduciary relationship and is therefore exempted from disclosure.

So, for example when a public authority like the ICAI provides model answers and instructions to examiners in confidence, it is because making those public, before the examinations are conducted, could

⁹⁶ Relevant extract from SC order at annexure 7(e).

⁹⁷ Unfortunately, this manual is itself secret and has also been held to be exempt from disclosure under the RTI Act. It is, therefore, not available to verify the veracity of this claim. However, there is an answer to a Parliament question that seems to confirm what is being stated: “... *The classification of files is not done under the provisions of the Official Secrets Act. The classification or declassification of files is done by each Ministry/ Department of the Government as per their requirement in terms of the Manual of Departmental Security Instructions, 1994. These instructions are reviewed by the Ministry of Home Affairs from time to time and reiterated to all the Ministries/ Departments for compliance...*” (available at <http://mha1.nic.in/par2013/par2015-pdfs/l5-050515/557.pdf>)

⁹⁸ See, for example, provision 9 of the *All India Services (Conduct) Rules, 1968*, accessible at http://ipr.ias.nic.in/Docs/AIS_ConductRules1968.pdf

compromise the examination process and harm the competitive position of a large number of candidates (third parties). Such information would, therefore, be exempt under section 8(1)(d) of the RTI Act. Of course, as discussed in chapter 15 (a), information exempt at any given point of time does not continue to be exempt for all time to come. Information relating to model answers can only adversely affect the competitive position of third parties if it is disclosed before the exams.

In **SC RBI 2015**, the Supreme Court went further and stressed an element of the definition of a fiduciary relationship that seemed to follow from the various definitions thrown up by the SC in different orders. The SC pointed out that as public authorities must always place the interest of the public above all other interests, and as a fiduciary must have undivided loyalty to those it is in a fiduciary relationship with, public authorities cannot be in a fiduciary relationship with anyone else except the public. Otherwise, there would always be the possibility of a conflict between the interests of the fiduciary and public interest.

“60. RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the Respondents herein.”

Added to this is the fact that both sections 8(1)(e) and 8(2) of the RTI act, specifically and generally, mandate that when there is a conflict, public interest must prevail.

Another significant assertion made by the SC in **SC RBI 2015** is that: *“where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship”* (para. 62). Most of the information provided by the public to the government is such that some law mandates its collection. This includes information provided in birth certificates, in school or college admission forms, in examination forms, in job applications, in income tax returns, in marriage certificates, in applications for passports, or ration cards, or for opening bank accounts, among numerous others. Information collected by public authorities from other public authorities is also mostly through the mandate of law, especially when it is sensitive information that could otherwise attract fiduciary protection. Therefore, as per the SC’s directive, all such information is disqualified from being considered as being held in a fiduciary relationship - then not much is left!

Considering all this, and given the immense amount of confusion and litigation on the issue of fiduciary, perhaps one option is to remove 8(1)(e) from the RTI Act altogether. Even without 8(1)(e), the legitimate need for confidentiality would be adequately met by all the other exemptions, especially that of privacy under section 8(1)(j). In any case, as already discussed, only that information is eligible to be held in a fiduciary relationship, that is already exempt under the RTI Act. Therefore, no value is added by further adding the exemption of fiduciary.

The Punjab and Haryana High Court in **HC-P&H Vikas Sharma 2014**, gives credence to this option when it quotes the division bench order **State Bank of India v. Central Information Commissioner and another, 2009 (1) RSJ 770**:

“.. It is difficult to imagine any information which comes to public authority on account of fiduciary relationship. A juristic entity such as the public authority carries out its affairs in accordance with established procedures...”

Perhaps the time has come to remove the “fiduciary relationship” exemption, and hopefully this will also get extensively debated.

b) “Fiduciary relationship” based exemptions related to examinations and selections

Note: For a consolidated summary of Supreme Court orders on exemptions in relationship to examinations and selections, either under the “fiduciary relationship” clause or some other clauses of the RTI Act, see Box 10 at the end of the chapter.

As discussed, in **SC ICAI 2011**, the Supreme Court was faced with the question: “9...*(iii)* Whether the instructions and solutions to questions are information made available to examiners and moderators in their fiduciary capacity and therefore exempted under section 8(1)(e) of the RTI Act?” As already mentioned, the SC came to the conclusion that instructions and solutions to questions were made available to examiners in secrecy and therefore they were bound by a fiduciary relationship not to disclose them to a third party.⁹⁹

The SC came to the conclusion that the said instructions etc. were the intellectual property of ICAI the disclosure of which would harm the competitive position of third parties till such time as the examination was held and answer scripts were evaluated. The SC held that instructions, and solutions to questions are given to examiners and moderators in their fiduciary capacity, and therefore exempted from disclosure under section 8(1)(e) of the RTI Act.

In **SC CBSE 2011**, the SC had examined the question whether a person could have access to his/her corrected answer sheet, or “..Whether an examining body holds the evaluated answer books “in a fiduciary relationship” and consequently has no obligation to give inspection of the evaluated answer books under section 8 (1)(e) of RTI Act?”

The SC went on to examine various definitions of the term “fiduciary” and finally concluded that the term fiduciary implied a duty to act for the benefit of another. By applying this understanding to the case in hand, the SC came to the conclusion that, as far as evaluated answer sheets go, an examining body (like the CBSE) did not have a fiduciary relationship with the examinee.

Equally significantly, the SC further clarified that that even if the relationship between the examining body and examinee was a fiduciary one, this could not come in the way of the examining body sharing information with examinee herself, but only restrict access of third parties.

The SC also rejected the claim that even if the examining body was not in a fiduciary relationship with the examinee, it had a fiduciary relationship with the examiner. The SC stated that the relationship between the body and the examiner was one of principal-agent. Therefore, while the examiner was in the position of a fiduciary with reference to the examining body and he was barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body, the examining body did not hold the evaluated answer books in a fiduciary relationship, *qua* the examiner, and therefore exemption under section 8(1)(e) was not available to the examining bodies with reference to evaluated answer-books.

In **SC Bihar PSC 2012**, an applicant had sought the names, addresses and some other details of members of an interview board that had conducted interviews at the behest of the BPSC for selection of candidates for a job. Though this information was denied by the PA and the SIC, and also by a single judge of the Patna High Court, on appeal a division bench of the HC directed that names of the members be provided, though addresses and other details were to be withheld.

Subsequently, the Bihar PSC challenged this division bench order in the SC arguing, among other things, that there was a fiduciary relationship between the examining body and the examiner or interviewer, therefore his or her identity cannot be revealed.

The SC, extensively quoting from the earlier discussed **SC CBSE 2011**, agreed with the findings of the earlier order that the relationship between the examining body and the interviewers or examiners (wrongly referred to as examinee) was not a fiduciary one.

⁹⁹ Relevant extract from SC order at annexure 7(e).

“26. We, with respect, would follow the above reasoning of the Bench and, thus, would have no hesitation in holding that in the present case, the examining body (the Commission), is in no fiduciary relationship with the examinee (interviewers) or the candidate interviewed. Once the fiduciary relationship is not established, the obvious consequence is that the Commission cannot claim exemption as contemplated under Section 8(1)(e) of the Act. The question of directing disclosure for a larger public interest, therefore, would not arise at all.”

However, the SC went on to deny this information under section 8(1)(g) of the RTI Act, holding that the revelation of names and identity of interviewers would endanger their life and physical safety (discussed in detail in chapter 17 of this report).

In **SC UPSC 2013** the Supreme Court examined requests for information, by job candidates (or third parties) about other candidates, especially their qualifications and experience. These were denied by the UPSC citing, among other reasons, section 8(1)(e) of the RTI Act. On appeal, the CIC directed disclosure, as did a single judge and the division bench of the Delhi High Court.

The Supreme Court held that there was a fiduciary relationship between the examining/selection body, in this case the UPSC, and the candidate, and therefore no information pertaining to the candidate could be given to a third party.

“12. By applying the ratio of the aforesaid judgment, we hold that the CIC committed a serious illegality by directing the Commission to disclose the information sought by the Respondent, at point Nos. 4 and 5 and the High Court committed an error by approving his order.

13. We may add that neither the CIC nor the High Court came to the conclusion that disclosure of the information relating to other candidates was necessary in larger public interest. Therefore, the present case is not covered by the exception carved out in Section 8(1)(e) of the Act.”

In **SC KPSC 2016**, the SC was called upon to decide whether examinees could be given copies of their evaluated answer sheets, tabulation sheets containing their interview marks and names of the examiners. The SC held that examinees should have access to their evaluated answer sheets and the tabulated marks, as these were not “kept” under a fiduciary relationship.

The SC further held that as far as names of examiners went, there was a fiduciary relationship between the Public Service Commission and the examiner and, as such, details of the examiner should not be disclosed. The SC further held that it could not see any public interest in disclosing these details.

“9. In the present case, the PSC has taken upon itself in appointing the examiners to evaluate the answer papers and as such, the PSC and examiners stand in a principal agent relationship. Here the PSC in the shoes of a Principal has entrusted the task of evaluating the answer papers to the Examiners. Consequently, Examiners in the position of agents are bound to evaluate the answer papers as per the instructions given by the PSC. As a result, a fiduciary relationship is established between the PSC and the Examiners. Therefore, any information shared between them is not liable to be disclosed. Furthermore, the information seeker has no role to play in this and we don't see any logical reason as to how this will benefit him or the public at large.

“10. In the present case the request of the information seeker about the information of his answer sheets and details of the interview marks can be and should be provided to him. It is not something which a public authority keeps it under a fiduciary capacity. Even disclosing the marks and the answer sheets to the candidates will ensure that the candidates have been given marks according to their performance in the exam. This practice will ensure a fair play in this competitive environment, where candidate puts his time in preparing for the competitive exams...but, the request of the information seeker about the details of the person who had examined/checked the paper cannot and shall not be provided to the information seeker as the relationship between the public authority i.e. Service Commission and the Examiners is totally within fiduciary relationship. The Commission has reposed trust on the examiners that they will check the exam papers with utmost care, honesty and impartially and, similarly, the Examiners have faith that they will not be facing any unfortunate consequences for doing their job properly. This may, further, create a situation where the potential candidates

in the next similar exam, especially in the same state or in the same level will try to contact the disclosed examiners for any potential gain by illegal means in the potential exam.”

In **HC-DEL IIT 2011** the HC Upheld a CIC order that the IITs ORM/ORS (computer evaluated examination papers) cannot be refused to examinees under section 8(1)(e) of RTI Act, as no fiduciary relationship can exist with a computer or optical scanning machine¹⁰⁰.

In **HC-CHH Kewal Singh Gautam 2011** the HC held that, in both the matters before it, two persons who had sat for departmental examinations and were not happy with their marks, be provided with certified copies of their corrected answer sheets, for the provisions of section 8(1)(e) were not applicable¹⁰¹.

In **HC-P&H Vikas Sharma 2014**, quoting *State Bank of India v. Central Information Commissioner and another, 2009 (1) RSJ 770*, the Punjab and Haryana High Court passed a similar order in relation to those who sat for competitive examinations and selection tests¹⁰².

In **HC-DEL UPSC vs Angesh Kumar 2012** also reiterates the point that there is great public interest and little harm in opening up the method of scaling/actualization in an examination and making it public:

“We are even otherwise of the view that there could be no secrecy or confidentiality about the method of scaling / actualization adopted by an examiner. The very objective of the RTI Act is transparency and accountability. The counsel for the UPSC has been unable to show as to how the disclosure of the scaling / actualization method prejudices the examination or affects its competitiveness...If it were to be held that there is any secrecy / confidentiality about the raw marks and the method of scaling, the possibility of errors therein or the same being manipulated cannot be ruled out. An examinee is entitled to satisfy himself / herself as to the fairness and transparency of the examination and the selection procedure and to maintain such fairness and transparency disclosure of raw marks, cut off marks and the scaling method adopted is a must.”

c) Exemptions related to banking

In **SC RBI 2015**, the question before the SC was whether the RBI was in a fiduciary relationship with various banks that it regulated and inspected, such that information and reports regarding its inspections and regulatory function could not be shared with the people of India. The SC held that there was no such fiduciary relationship between the RBI and the other banks and that there can be no fiduciary relationship for information that is statutorily required to be provided:

“58. In the instant case, the RBI does not place itself in a fiduciary relationship with the Financial institutions (though, in word it puts itself to be in that position) because, the reports of the inspections, statements of the bank, information related to the business obtained by the RBI are not under the pretext of confidence or trust. In this case neither the RBI nor the Banks act in the interest of each other. By attaching an additional "fiduciary" label to the statutory duty, the Regulatory authorities have intentionally or unintentionally created an in terrorem effect.”

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“60. RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the Respondents herein.”

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¹⁰⁰ Relevant extract of HC order at annexure 7(e).

¹⁰¹ Relevant extract of HC order at annexure 7(e).

¹⁰² Relevant extract of HC order at annexure 7(e).

“62. The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship. As in the instant case, the Financial institutions have an obligation to provide all the information to the RBI and such an information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship. One of the main characteristic of a Fiduciary relationship is "Trust and Confidence". Something that RBI and the Banks lack between them.”

d) *Exemptions related to the relationship between the President and governors*

In **HC- BOM 2011 PIO, Raj Bhawan, Goa** the HC held that communications sent by the Governor to the President of India are not covered under the exemption of fiduciary relationship, as their relationship is not a fiduciary one.

“43.... Point No. 4: The relationship between the President of India and the Governor of a State is not fiduciary. The President cannot be said to hold a fiduciary position qua the Governor of a State. Consequently, the information sought for by the respondent no.1 in Writ Petition No. 478 of 2008, i.e. a copy of the report made by the Governor to the President (through the Home Minister) under Article 356(1) of the Constitution of India is not exempt from disclosure under section 8(1)(e) of the RTI Act.”

e) *Exemptions relating to the assessment of officials by their superiors*

In **HC-DEL UoI vs. Col. VK Shad 2012** the Delhi High Court held, while deciding whether the remarks made by an officer on the performance of a subordinate can be shared with the subordinate, that if a fiduciary relationship was postulated between the evaluator and the institution, in this case the army, then it would mean that the evaluator was an interested party whose interests were to be protected. However, the evaluator must be an objective party, and therefore cannot be said to be in a fiduciary relationship with the institution¹⁰³.

In **HC-HP State Bank of India 2014**, quoting from *Union of India v. R.S. Khan*, MANU/DE/2841/2010 : AIR 2011 Delhi 50, the Himachal Pradesh HC held similarly, but in this case relating to the evaluation of civilian officers¹⁰⁴.

f) *Agenda for action*

- i. It would be best to move the Supreme Court to definitively rule out the possibility of a fiduciary relationship existing between a public authority and anyone else but the public. This would put to rest the tiresome and unseemly bickering where everyone claims to give every bit of information to everyone in a fiduciary relationship.
- ii. Failing such an SC order, the government and the Parliament should consider dropping 8(1)(e) from the statute books.

¹⁰³ Relevant extract of HC order at annexure 7(e).

¹⁰⁴ Relevant extract of HC order at annexure 7(e).

- iii. In any case, for the reasons detailed in this report, the SC needs to be petitioned to review its various orders refusing public access, under the RTI Act, to answer sheets of other candidates (other than one's own), to the identity of examiners, to the identity of those who appeared in examinations or selection processes, and details of their performance. There appears to be very overpowering public interest to review and overturn these orders, apart from the seeming contradiction between different SC orders.

BOX 10

Summary of the SC's Views on access to information regarding examinations and selections

Six important questions were raised in various matters before the Supreme Court relating to access of information regarding examinations and interviews. These were:

- I. Can an examination candidate access copies of her own corrected answer sheets?
 - II. Can a third party access details of examinees/ candidates?
 - III. Can details of examiners and/or interviewers be accessed?
 - IV. Can instructions given to examiners regarding grading and correct or model solutions, be accessed?
 - V. Can details regarding the moderation done on the marks awarded by different examiners be accessed?
 - VI. Can the information commission require examination bodies to preserve corrected answer papers beyond the period specified by the examination body's own rules?
- I. Accessing one's own corrected examination sheets.

The SC held that there is no barrier under the RTI Act to examinees accessing their own corrected answer sheets, provided that the names and details of the examiners were removed and the request for a copy was received within the period that the answer sheets were preserved, as per the rules of the examining body.

Legal basis: In *CBSE vs Aditya Bandopadhyay (SC CBSE 2011)* the SC held that there was no fiduciary relationship, as was being claimed, between the examinee and the examination conducting body. The SC further stated that even if there was a fiduciary relationship between the examinee and the examination conducting body, it would not come in the way of examinees accessing their own corrected sheets.

The SC also held (*SC CBSE 2011*) that the identity and details of examiners should be removed and also clarified that the IC had no jurisdiction to instruct the examining body to preserve the corrected answer sheets beyond the period specified in the rules of the said body.

- II. Third party accessing details of examinees/candidates.

The SC held that third parties cannot access details of examinees/candidates under the RTI Act.

Legal basis: The SC held in *UPSC vs Gourhari Kamila and others (SC UPSC 2013)* that this could not be permitted as there was a fiduciary relationship between the examinee and the examination conducting authority, as defined under section 8 (1) (e) of the RTI Act, and this would be violated if names and other details of examinees/candidates were shared with a third party. The court also held that there was no larger public interest that could ordinarily justify such a disclosure.

- III. Third party accessing names and details of examiners/interviewers.

The SC held that third parties could not access the names and other details of examiners and interviewers under the RTI Act.

Legal basis: In *SC CBSE 2011* the SC held that the names and details of examiners must be redacted, as they deserved protection under section 8(1)(g) of the RTI Act, which exempts from disclosure "information, the disclosure of which would endanger the life or physical safety of any person.....;" In *SC BPSC 2012* the SC cited *SC CBSE 2011* and held that the identities or contact details of interviewers could not be disclosed as their disclosure is exempt under section 8(1)(g) of the RTI Act.

Box 10 contd...

IV. Accessing instructions given to examiners regarding grading and correct or model solutions.

The SC held that instructions given to examiners regarding grading and correct or model solutions could not be disclosed under the RTI Act.

Legal basis: The SC framed various questions for itself in *Institute of Chartered Accountants vs. Shaunak H Sayta & Ors* 2011 (SC ICAI 2011). These included “(a) Whether the instructions and solutions to questions (if any) given by ICAI to examiners and moderators, are intellectual property of the ICAI, disclosure of which would harm the competitive position of third parties, and therefore exempted under section 8(1)(d) of the RTI Act? (b) Whether providing access to the information sought (that is instructions and solutions to questions issued by ICAI to examiners and moderators) would involve an infringement of the copyright and(c) Whether instructions, and solutions to questions, are information made available to examiners and moderators in their fiduciary capacity and therefore exempted from disclosure under section 8(1)(e) of the RTI Act?”

The SC came to the conclusion that the said instructions etc. were the intellectual property of ICAI the disclosure of which would harm the competitive position of third parties till such time as the examination was held and answerscripts were evaluated (a above). However, the Court held that such disclosure would not infringe copyright (b above). The SC held that instructions, and solutions to questions, are given to examiners and moderators in their fiduciary capacity, and therefore exempt under the RTI Act (c above).

V. Details regarding the moderation done on the marks awarded by different examiners.

The SC held that though there was no legal barrier in making the procedures, criteria and rationale for moderation public, however as the public authority did not maintain, nor was it required to maintain, details of the number of times the examining body had revised the marks of any candidate, the quantum of such revisions; and the number of students (with particulars of quantum of revision) affected by such revision, held in the last five examinations at all levels, these could not be demanded under the RTI Act.

Legal basis: The SC held in SC ICAI 2011, that information that was not held by or under the control of the PA, nor required to be maintained by the PA, could not be accessed under the RTI Act, as section 2(j) of the act stated that “right to information” means the right to information accessible under this Act which is held by or under the control of any public authority.....”.

VI. Information commission requiring examination bodies to preserve information beyond the period specified by the examination body’s own rules.

The SC held that information need only be preserved for as long as the rules of the examination body specify and it is not within the powers of the information commissions to increase this period.

Legal basis: The SC held in SC ICAI 2011 that section 19(8) of the RTI Act did not empower the IC to order the preservation of information beyond the period laid down in the rules of the examining body.

17. Safeguarding life and physical wellbeing [S. 8(1)(g)]

Section 8(1)(g) of the RTI Act:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

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(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;”

Major Issues

It seems reasonable to exempt from disclosure information that might endanger the life or physical safety of anyone. However, at least four issues need consideration.

First, the threat must be a credible threat and not a vague apprehension of the sort that could be raised against the disclosure of most types of information. Otherwise, all information that might, for example, expose corrupt officials could be held to be posing a threat to the physical safety, if not life, of the corrupt official, and therefore become exempt from disclosure.

Second, the threat must be to a specific person, or to a specific category of people who have a shared enhanced threat perception (like people with a high security classification), rather than to a whole class of people who perform a common task. Therefore, it would not be acceptable to say that the identity of all police personnel involved in anti-corruption activities needs to be exempt from disclosure, just because some of them might face a threat to their life or safety. However, specific personnel who, for example, were involved in investigating some very influential and ruthless criminals, or were working in locations where the law and order machinery was weak and the normal protection due to them could not be provided, could be extended this protection.

Third, such exemptions should only be imposed if the information sought to be exempted is such that it is not already in the public domain. Very often, identity of functionaries is sought to be kept secret even though they are publicly observed performing the functions that make them vulnerable. In some cases, names are revealed but addresses are redacted, even though public lists like those in telephone directories, or voter's lists, or even directories produced by resident welfare associations or housing societies, list all the addresses.

Fourth, the exemption must be for a limited time period, while the threat is credible, and not forever.

Of course, where a person has agreed to assist a public authority for law enforcement or security purposes, on the explicit understanding that the person's identity would be protected, and there are good reasons to provide such protection, then all this might not apply. But the four conditions listed above would certainly apply to those whose identity should ordinarily be public, but because of some special circumstances and for a limited period of time, they need to be provided a cover.

The ideal situation would be where people could take difficult decisions and perform sensitive tasks, without the fear of retribution from those adversely affected. This would require a heightened level of transparency so that affected persons had access to the reasoning behind decisions and actions, and could see that whatever was done was done in good faith. It would also help if these affected parties knew that any retaliatory effort, especially violence, would be met with strong preventive and deterrent measures.

In the absence of this, there would be a growing tendency to provide anonymity to all and sundry. This could well be like a growing general amnesty where there would be little external incentive for public servants

to be fair minded in their decision making, and the added lack of transparency would result in increased suspicion among the public regarding the functioning of public servants.

Needless to say, where there is a genuine concern in a specific case, especially one which attracts any of the exemptions in section 8(1), like privacy, both the public servant's and the RTI applicant's identities must be protected. In any case, it is not enough to determine that some harm could occur if information exempt under any of the clauses of section 8(1) was made public. What is required is to determine how likely its occurrence is in the specific case under consideration.

Specifically, exemption under section 8(1) are such that they only become operative if the likelihood of actual harm is established, and is greater than the public interest in disclosure [S. 8(2)]. Therefore, it is not enough to say that this information could cause actual harm and therefore should be exempt from disclosure, what is required to be established is that given past experience and/or prevailing conditions, there is a high likelihood of actual harm. This probability would have to be balanced against the public interest in disclosure. Otherwise, gradually, most information, or at least most information that might possibly annoy someone, would stand exempt from disclosure under section 8(1)(g).

a) Safeguarding examiners

The Supreme Court, in **SC CBSE 2011**, has recognised that examiners might face a potential threat from dissatisfied examinees and therefore upheld the invocation of section 8(1)(g) to exempt from disclosure the identity and other details of examiners. Whereas there are certainly grounds for apprehension that in certain parts of India, or under certain specific circumstances and conditions, examiners would face such a threat, it is difficult to believe that everywhere, and for all examinations, and for all time to come, such a threat exists to a level that it is justified to keep their identity secret.

While allowing examinees access to their own evaluated answer sheets, the SC holds that, nevertheless, the information regarding the identity of examiners and others involved in the evaluation must be first severed from these answer sheets, as this is exempt under section 8(1)(g) of the RTI Act.

“28. When an examining body engages the services of an examiner to evaluate the answer-books... the examiner... expects that his name and particulars would not be disclosed to the candidates whose answer-books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator, and head-examiner who deal with the answer book. The answer book usually contains not only the signature and code number of the examiner, but also the signatures and code number of the scrutiniser/coordinator/ head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/ head examiners are therefore exempted from disclosure under section 8(1)(g) of RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety...”

Responding to the question whether identities of examiners can be made public, the SC held (**SC KPSC 2016**) that they cannot, for various reasons, including the fact that this would endanger the safety of the examiners and serve no useful public function. Among other reasons, the SC also warned that revealing identities of examiners might encourage candidates sitting for future examinations to contact them and seek undue advantage.

“9. ... We would like to point out that the disclosure of the identity of Examiners is in the least interest of the general public and also any attempt to reveal the examiner's identity will give rise to dire consequences. Therefore, in our considered opinion revealing examiner's identity will only lead to confusion and public unrest. Hence, we are not inclined to agree with the decision of the Kerala High Court with respect to the second question.”

“10..... If we allow disclosing name of the examiners in every exam, the unsuccessful candidates may try to take revenge from the examiners for doing their job properly. This may, further, create a situation where the potential candidates in the next similar exam, especially in the same state or in the same level will try to contact the disclosed examiners for any potential gain by illegal means in the potential exam.”

Though this is a valid concern, unfortunately even if examiners names were kept secret by the PA there is nothing to stop those who were invited to examine papers, and who wanted to take advantage of this responsibility, from spreading the word that they were open to illegal gratification. Therefore, the threat of bribery would be better tackled through detection and enforcement rather than through secrecy, which rarely works in the face of committed crookery.

Public disclosure of the identity and qualifications of examiners is an important part of building, perhaps restoring, public confidence in the examination and selection process. The public must be reassured that examination answer-sheets are evaluated by examiners who are qualified to evaluate them, and that the examiners do not have any seeming conflict of interest.

Also, if one implements strategies to keep hidden the identity of all those who, in the process of doing their job, might annoy or anger vested interests, then there is no reason to restrict this to just examiners. There are many other public functionaries who have to take even harsher decisions, that might well be even more strongly resented by those adversely affected. Judges and police officers do this all the time, as do journalists, civil servants, income tax officers, seniors in offices, teachers involved in admissions or disciplinary action, or even bankers. It would be difficult and undesirable to move towards a system where the identity of all these functionaries would have to be kept secret. Whereas there might be specific cases where it is prudent, at least in the short term, to protect the identity of a specific individual, surely this should neither be universalised nor accepted as an evolving future scenario, otherwise the right to information will die a quick and painful death.

To overcome the technical issue of whether revealing identities would be a breach of faith, especially in the case of examiners who might have accepted the role on the expectation of secrecy, there could be a specific clause in their contract that their identity could be made public unless the PA was convinced that that there was a specific and credible threat, or unless they could establish the same to the satisfaction of the PA.

Interestingly, some RTI Activists, inspired by this attitude of the government and sensitive to the increasing threats and incidents of physical attacks on RTI applicants, have started demanding that the identity of RTI applicants be kept secret. Perhaps they do not see the irony of demanding for themselves a general and universal anonymity while insisting that even honest and hardworking public servants, performing sensitive functions, be publicly accountable and identifiable, unless a specific and significant threat exists.

In any case, the logic of giving general and blanket anonymity to RTI applicants would promote a climate of fear where, instead of demanding sanctions against vested interests who might threaten RTI applicants, there is a move towards secrecy and opaqueness in the system. Surely we don't want a society where all complaints or appeals must be filed anonymously, and all decisions that could adversely affect someone are shrouded in secrecy.

In reality, keeping the identity of RTI applicants secret is dangerous for RTI applicants themselves, as their identities could well be clandestinely accessed from government records by the affected vested interests, many of whom might themselves be in the government. Whereas public knowledge of their RTI application could protect them from harm, for the vested interests would realise that if any harm befalls them, the finger of suspicion would point at them, this would not be so if their RTI application was kept secret.

As has been recommended many times before, the best way of protecting RTI applicants from harm is for PAs and ICs to resolve that every time an applicant is attacked, the information that the applicant was seeking would be immediately made public. Therefore, any attack on the applicant would be counterproductive as it would only hasten the disclosure of information that was sought to be withheld. This might even inspire the affected vested interests to provide protection to RTI applicants at their own cost, for the last thing they would want is for such information being made public because someone else had harmed the applicant!

b) Safeguarding interviewers

While examining the applicability of exemption under section 8(1)(g) to a request for the names of interviewers who interviewed candidates for appointment to jobs, the Supreme Court clarified, in **SC Bihar PSC 2012**, that the provisions of 8(1)(g) are applicable to everyone and not just to law enforcement or security organisations, as wrongly held by the Patna High Court.

The SC then went on to hold that the disclosure of the identity of members of the interview board would expose these interviewers to threat from disgruntled candidates, without serving any public purpose. It, therefore, held that such information was exempt under section 8(1)(g) of the RTI Act.

“29. Now, the ancillary question that arises is as to the consequences that the interviewers or the members of the interview board would be exposed to in the event their names and addresses or individual marks given by them are directed to be disclosed. Firstly, the members of the Board are likely to be exposed to danger to their lives or physical safety. Secondly, it will hamper effective performance and discharge of their duties as examiners.direction to furnish the names and addresses of the interviewers would certainly be opposed to the very spirit of Section 8(1)(g) of the Act.....

“30. The disclosure of names and addresses of the members of the Interview Board would ex facie endanger their lives or physical safety. The possibility of a failed candidate attempting to take revenge from such persons cannot be ruled out. On the one hand, it is likely to expose the members of the Interview Board to harm and, on the other, such disclosure would serve no fruitful much less any public purpose. Furthermore, the view of the High Court in the judgment under appeal that element of bias can be traced and would be crystallized only if the names and addresses of the examiners/interviewers are furnished is without any substance. The element of bias can hardly be co-related with the disclosure of the names and addresses of the interviewers. Bias is not a ground which can be considered for or against a party making an application to which exemption under Section 8 is pleaded as a defence.” (SC Bihar PSC 2012)

The case for anonymity of interviewers, as upheld in **SC Bihar PSC 2012**, seems infructuous, for ordinarily those interviewing candidates come face-to-face with the candidates themselves. Unless the interviewers are masked or the interviewees blindfolded, the identities of the interviewers are already known to the interviewees.

This was also a view point taken by the Patna High Court, in **HC-PAT Saiyed Hussain Abbas Rizwi 2011**. However, this order was subsequently overturned by the Supreme Court.¹⁰⁵ The HC held:

“13... The substance of the queries which have evoked no response are to the effect that he wants the names of the interviewers alongwith their addresses and photocopy of the signatures of the interview statement... In the present case, the names of the interviewers cannot be denied for various reasons. The interviewers are visible to the candidates while the interview is being held. They have public egress and ingress to the venue of the interview. It is a possible situation that the applicant may have reasons for suspicion that a particular interviewer was on the interview board and his close relation was appearing. Such determination cannot be made unless the names of the interviewer and the candidate who appeared are disclosed. If he denies this information, it would be defeating the aims and objects, the preamble, and the legislative intent of the Act. We cannot countenance such an obstruction to such laudable Act which is intended to bring about

¹⁰⁵ **SC Bihar PSC 2012**

transparency in governance, and root out corruption, in this country. The judgment of the Supreme Court in the case of A.K. Kraipak and Ors. v. Union of India and Ors. MANU/SC/0427/1969 : A.I.R. 1970 S.C. 150 is an appropriate example to show that one of the members of the Board was himself a candidate for promotion from the State cadre to the Central cadre of Indian Forest Service. If we prohibit the information which the applicant is seeking to obtain, the misdeed as had taken place in A.K. Kraipak v. Union of India (supra), may not be set at naught.

14. To make a comparison with the court/judicial proceedings, vis-a-vis an interview; Court proceeding is open and the names of the Judges who are hearing the matter are well-known to the parties. When court proceedings can be held in broad daylight and the names of Judges are known to all the parties, why not the names of interviewers be disclosed to the applicant. We must, however, strike the requisite note of caution that the applicant on account of overenthusiasm or inexperience, has sought irrelevant informations by seeking photocopies of the signatures of the interviewers and has equally overdone by seeking their residential addresses, which will serve no public purpose. Respondent No. 2, therefore, is justified in declining informations to that extent because the same would not be in public interest, and will not in the least serve the applicant's purpose.”

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“18. In the result, we disagree with the order of the learned Single Judge in so far as it relates to exemption of names of the interviewers from being disclosed. The appeal and the writ petition are allowed. Respondent No. 2 is directed to communicate the information to the Appellant in the manner indicated hereinabove forthwith. In the circumstances of the case, there shall be no order as to costs.”

Ordinarily the need for secrecy should be identified before a process starts, and measures for hiding the identity of interviewers be ensured from the beginning of the process. It is of little value to introduce this mid-way or after the process is over.

Besides, all the reasons against examiners' identities being protected, discussed earlier, also apply to interviewers. And as in the case of examiners, we certainly do not want to move towards a society where everyone who is in a position to make a decision which might not be liked by another would have to be masked, or interact with people from behind curtains. Nevertheless, there could be special circumstances under which such anonymity is prudent, but these must be justified case by case, and for good reasons.

Sooner or later people will have to make a decision about whether they want for ever to live in fear and in hiding from all those who might have a reason to be unhappy with them, or should they work towards a system where threats are jointly confronted and neutralised by the combined efforts of the government and the people. Whereas there will always be individuals who, for one reason or another, and for a specific period of time, require special protection and even anonymity, all social institutions must recognise that this must be a rare happening and that, on the whole, we must move towards being an open and collectively empowered community.

c) Agenda for action

- i. The SC needs to be petitioned to review its order (**SC Bihar PSC 2012**) and to restrict exemptions under section 8(1)(g) to cases which meet the four conditions listed under “Major issues” above.
- ii. Meanwhile, public authorities and information commissions need to recognise that public interest would be better served if there was greater transparency regarding the rationale and need for even those decisions and actions that are not to the liking of most people. Often anger and the urge for vengeance is aggravated if the affected parties do not know the basis for decisions or why the government has acted in a particular way, and consequently feel that they have been unfairly treated. ICs need, therefore, to more stringently insist on compliance with provisions of section 4(1)(c) & (d), and be far more conservative in exempting information under section 8(1)(g).

- iii. Where it is deemed important to protect the identity of a functionary, this must be done effectively and from the beginning, as it is useless to invoke secrecy only when an RTI application is received. Such retrospective confidentiality raises the suspicion of *malafide*. Therefore, relevant public authorities should develop rational policies for protecting the identity of functionaries engaged in sensitive assignments. These should be finalised in consultation with the concerned information commission, to ensure that they are within the ambit of the RTI Act.
- iv. While determining the applicability of this section, the PIO and IC must ensure that the information sought to be denied is not already in the public domain, and whether the perceived threats are specific and serious enough to justify the asked for secrecy. These must be justified in detail, and in writing, in all orders.

18. Impeding investigation, apprehension or prosecution [S.8(1)(h)]

Section 8(1)(h) of the RTI Act:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

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(b) information which would impede the process of investigation or apprehension or prosecution of offenders:”

Major Issue

Unfortunately, section 8(1)(h) is often invoked when information is sought about any ongoing investigation or prosecution, without establishing that the disclosure of the asked for information would impede one or more of these processes, or impede the apprehension of the offender.

It might be relevant here to remember that under section 19(5) of the RTI Act the onus of proof for justifying the denial of information is on the PIO. As such, it is the obligation of the PIO to produce evidence in support of the plea that the release of asked for information would impede the process of investigation, apprehension, or prosecution, of offenders.

There were no SC orders and a few high court orders that dealt with this issue. In three orders the high court held that though investigation might be ongoing, there was no evidence to establish that the disclosure of the sought for information would impede the process of investigation.

a) Just sub-judice or actually impeding

In ***HC-AP PIO 2011***, the HC clarified that just because the information asked for from a bank pertains to a pending proceeding before a debt recovery tribunal, this is not enough to attract the provisions of section 8(1)(h). It has to be established that its disclosure would impede the process.

“8. Even on merits, this Court has no hesitation to hold that the information sought for by respondent No. 2 does not fall within the exempted category under Section 8(1)(b) of the Act because the information, which respondent No. 2 has sought, relates to pending proceedings before the Debt Recovery Tribunal. However, what is exempted under section 8(1)(b) is information, which would impede the process of investigation or apprehension or prosecution of offenders. It is not the pleaded case of the Bank that any investigation or apprehension or prosecution of respondent No. 2 will be impeded by furnishing information sought for by him. Even if the information relates to a pending dispute before a Court or Tribunal, that would not fall under Section 8(1)(b) of the Act.”

Along the same lines, but with a very much more detailed consideration of the issues involved, is the HC order in ***HC-DEL BS Mathur 2011***. Therein, the Delhi High Court held that just the mere interconnectedness of documents with another ongoing enquiry was not enough to justify the application of section 8(1)(h). The additional threat of “hampering” or “interference” would also have to be established:

“19. The question that arises for consideration has already been formulated in the Court's order dated 21st April 2011: Whether the disclosure of the information sought by the Petitioner to the extent not supplied to him yet would "impede the investigation" in terms of Section 8(1)(b) RTI Act" The scheme of the RTI Act, its objects and reasons indicate that disclosure of information is the rule and nondisclosure the exception. A public authority which seeks to withhold information available with it has to show that the information sought is of the nature specified in Section 8 RTI Act. As regards Section 8(1)(b) RTI Act, which is the only provision invoked by the Respondent to deny the Petitioner the information sought by him, it will have to be shown by the public authority that the information sought "would impede the process of investigation." The mere reproducing of the wording of the statute would not be sufficient when recourse is had to Section

8(1)(b) RTI Act. The burden is on the public authority to show in what manner the disclosure of such information would 'impede' the investigation. Even if one went by the interpretation placed by this Court in W.P. (C) No. 7930 of 2009 (Additional Commissioner of Police (Crime) v. CIC, decision dated 30th November 2009) that the word "impede" would "mean anything which would hamper and interfere with the procedure followed in the investigation and have the effect to hold back the progress of investigation", it has still to be demonstrated by the public authority that the information if disclosed would indeed "hamper" or "interfere" with the investigation, which in this case is the second enquiry.

20. The stand of the Respondent that the documents sought by the Petitioner "are so much interconnected" and would have a "bearing" on the second enquiry does not satisfy the requirement of showing that the information if disclosed would "hamper" or "interfere with" the process of the second enquiry or "hold back" the progress of the second enquiry. Again, the stand in the chart appended to the affidavit dated 25th March 2011 on behalf of the Respondent is only that the information sought is either "intricately connected" or "connected" with the second enquiry or has a "bearing" on the second enquiry. This does not, for the reasons explained, satisfy the requirement of Section 8(1)(b) RTI Act.

21. Mr. Bansal submitted that this Court could examine the records and determine for itself which of the information would if disclosed impede the second enquiry. This submission is untenable for the simple reason that it is not for this Court to undertake such an exercise. This is for the PIO of the High Court to decide. However, the PIO nowhere states that the disclosure of the information would "hamper" or "interfere with" the process of the second enquiry. There is consequently no need for this Court to form an opinion in that regard.

22. The reliance placed by the Respondent on the conclusion of the CIC in the impugned order that the disclosure of the information would impede the process of investigation "in the peculiar facts and circumstances" begs the question for more than one reason. First, there is a marked change in the circumstances since the impugned order of the CIC. The second enquiry has, by a decision of the Chief Justice of 3rd March 2011, been kept in abeyance which was not the position when the appeals were heard by the CIC. Secondly, it is difficult to appreciate how disclosure of information sought by the Petitioner could hamper the second enquiry when such second enquiry is itself kept in abeyance. The mere pendency of an investigation or enquiry is by itself not a sufficient justification for withholding information. It must be shown that the disclosure of the information sought would "impede" or even on a lesser threshold "hamper" or "interfere with" the investigation. This burden the Respondent has failed to discharge.

23. It was submitted by Mr. Bansal that this Court could direct that if within a certain timeframe the second enquiry is not revived, then the information sought should be disclosed. This submission overlooks the limited scope of the present writ petition arising as it does out of the orders of the CIC under the RTI Act. It is not within the scope of the powers of this Court in the context of the present petition to fix any time limit within which the Respondent should take a decision to recommence the second enquiry which was kept in abeyance by the order dated 3rd March 2011 of the Chief Justice.

24. No grounds have been made out by the Respondent under Section 8(1)(b) of the RTI Act to justify exemption from disclosure of the information sought by the Petitioner. 25. The writ petitions are accordingly allowed and the impugned order dated 6th September 2010 of the CIC is hereby set aside. Information to the extent not already provided in relation to the three RTI applications should be provided to the Petitioner by the Respondent within a period of four weeks from today. While providing the information it will be open to the Respondent to apply Section 10 RTI Act where required." (Emphasis added)

Despite the law being clear and specific on this issue, there is a tendency among ICs to go beyond the law by upholding denials because investigation is ongoing or they were *sub-judice*, even though there is no such provision in the RTI Act. Some typical examples are described below.

In one case, the CIC ruled that information not be provided by the Life Insurance Corporation (LIC) to the appellant till the investigation was over:

"The respondents stated that it is not possible for them to provide the information as the investigation in the matter has not been finally concluded and therefore they have sought exemption under section 8(1)(b) of the RTI Act. During the

bearing the respondents informed that the investigating officer has recommended the closure of the case... The respondents will follow up the matter with the competent authority to finalize matter and the respondents will convey the final outcome of the case to the appellant within a week of its receipt by them.” (CIC/000217 dated 23.01.2014)

In a similar case, the CIC upheld denial of information by the NTPC, stating that:

“given the fact that criminal investigation is going on as also a departmental enquiry, the CPIO is right in invoking section 8(1)(h) in the matters in hand. In view of this, I am inclined to dismiss these appeals.” (CIC/\901070 dated 19.07.2013)

Again, in an appeal against the United Commercial Bank, the CIC ruled that:

“The respondent also stated that the information pertained to an investigation report and the current status of the matter is sub-judice. Hence, taking into account also that this was confidential and privileged information, the information was denied under the RTI Act. 5. The CPIO has acted in conformity with the RTI Act. The CPIO’s response has also upheld by the FAA on 2672012. The Commission’s intervention is not required in the matter.” (CIC/001204 dated 2.8.2013)

Similarly, the Rajasthan IC upheld the PIO’s contention that information cannot be provided as the matter is sub-judice. The IC went on to maintain that even if the matter was not before the court now, only information that was available at the time of the information request can be provided. (*SIC/RAJ/4076 dated 30.12.2013*)

b) Information already public

In *HC-DEL Delhi Metro RC Ltd 2011*, the HC argues that as the drawings related to the metro pillar that collapsed are admittedly already available on the internet, and therefore in public domain, there can be no bar to releasing them and even though investigation might be ongoing, section 8(1)(h) does not become applicable.

c) Agenda for action

- i. ICs need to take cognisance of the actual wording of the law, and judicial orders on this exemption, and start dealing with appeals and complaints accordingly.
- ii. The DoPT should issue a circular to all states and competent authorities, and all Central Government PAs specifically bringing to their notice the judicial interpretation (*HC-DEL BS Mathur 2011*) that ‘impeding’ must be proved.

19. Accessing cabinet papers [S.8(1)(i)]

Section 8(1)(j) of the RTI Act:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

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“(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed; “

Major Issues

In most democracies, the cabinet is seen as the ultimate bastion of power and secrecy, as almost all is revealed to the cabinet, barring just a few intelligence and security matters either too sensitive to risk leakage, or too diabolical to risk compromising plausible deniability. These remain with just the Prime Minister, perhaps a few trusted ministers, and key officials, all sworn to eternal secrecy, or at least till their memoirs aspire to become best sellers. Therefore, making decisions of Council of Ministers, and the reasons thereof, accessible is undeniably a great achievement for any transparency regime. The Indian law has achieved this, albeit with a few riders. The most important of these are the restriction of access till “the matter is complete, or over”, whatever that might mean. There prevails a view among the inhabitants of the corridors of power that most matters are never complete, nor ever over.

Then there is the question of what is included in “decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken”. What about the agenda and minutes of the committee of secretaries, or the notes prepared by various departments and ministries?

And, finally, what is meant by “made public”? If read with section 4(1)(c) and (d), does this mean that the cabinet secretariat needs to proactively make public information about all decisions of the Council of Ministers, the moment the matter being decided on is complete or over?

a) Restrictions on disclosure

Surprisingly, there is no SC order and only one HC order dealing with 8(1)(i). In ***HC-DEL UoI vs. PK Jain 2013***, the Delhi High Court examined the question of what was exempt under section 8(1)(i), and under what conditions. The HC held that once a decision of the cabinet had taken effect, then the restriction section 8(1)(i) placed on its disclosure was lifted. The HC also held that once decisions of the council of ministers had taken effect, they along with related information would all be accessible under the RTI Act:

“5. It would be seen from a conjoint reading of the main Clause (i) and the first proviso to the said Clause, that though there is a prohibition against disclosure of Cabinet papers, which would include record of deliberations of the Council of Ministers, Secretaries and other officers, such prohibition as far as RTI Act is concerned, is not for all times to come and has a limited duration till the Council of Ministers takes a decision in a matter and the matter is complete or over in all respects. Considering the context in which the words “the matter is complete or over” have been used it appears to me that once the decision taken by the Council of Ministers has been given effect, by implementing the same, the prohibition contained in Clause (i) is lifted and the decision taken by the Council of Ministers, the reasons on which the decision is based as also the material on the basis of which the said decision was taken can be accessed under the Right to Information Act. Mr. Dubey, the learned counsel for the petitioner- Union of India has drawn my attention to the fact that the expression used in the main Clause is ‘cabinet papers’ whereas the first proviso refers only to the decision of the Council of

Ministers, the reasons thereof and the material on which such decisions are based. The Cabinet comprises of the Prime Minister and the Cabinet Ministers whereas the Council of Ministers comprises not only the Prime Minister and the Cabinet Ministers, but also the Ministers of State and the Deputy Ministers. Therefore, the Council of Ministers is a larger body as compared to the Cabinet. Hence, once the decision taken by the Council of Ministers/Cabinet has been implemented, the decision taken by the said Council/Cabinet as well as the reason for such decision and the material on the basis of which the decision was taken cannot be withheld by the concerned CPIO.”

Though clause (i) did not specify that deliberations of secretaries and other officers would also be made public, the HC held that in so far as they were part of the material on the basis of which the cabinet and/or the council of ministers formed their decision, they could not be withheld:

6. Mr. Dubey points out that in Clause (i), Cabinet papers include record of deliberations not only of the Council of Ministers but also of the Secretaries and other officers but the proviso does not apply to the deliberations of the Secretaries and other officers, meaning thereby that even after a decision has been implemented, the deliberations of the Secretaries and other officers cannot be disclosed. A careful perusal of the proviso would show that not only the decisions of the Council of Ministers and the reasons on which the said decisions are based but also the material on the basis of which the decisions are taken by the Council of Ministers are also required to be disclosed, once the decision has been implemented. Therefore, in case the deliberations of the Secretaries and/or other officers constitute the material which formed the basis for the decision of the Council of Ministers, the said deliberations of the Secretaries and/or other officers also cannot be withheld. (HC-DEL UoI vs. PK Jain 2013)

The HC also significantly held that the decision of the Appointments Committee of the Cabinet on the promotion of government servants, even though it was communicated to the President, could not be considered “*advice of the Ministers to the President within the meaning of Article 74 of the Constitution and, therefore, cannot be withheld if it is otherwise accessible under the provisions of the Right to Information Act.*”¹⁰⁶

*“7. Mr. Dubey also draws my attention to Article 74(2) of the Constitution of India which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court and submits that in view of the said prohibition, the decision taken by the Cabinet Committee on Appointments (ACC), the same being advice tendered to the President, cannot be directed to be disclosed. The question which arises for consideration from the submission made by Mr. Dubey is as to whether the decision taken by the Cabinet Committee on Appointments (ACC) on promotion of Additional Chief Engineers to the grade of Chief Engineers in MES of the Ministry of Defence amounts to "advice tendered by Ministers to the President" within the meaning of Article 74 of the Constitution or not. A similar issue came up for consideration before a Division Bench of this Court in *Waris Rashid Kidwai Vs. Union of India & Ors.* MANU/DE/0031/1998 : (1998) ILR Delhi 589. The petitioner in that case filed a petition challenging the mode and manner of appointment to the post of the Chairman and Managing Director of Minerals & Metals Trading Corporation (MMTC). The procedure for filling up the said post was that the Public Enterprises Selection Board (PESB) used to lay down job descriptions, qualifications and experience for eligible candidates, shortlist candidates out of the eligible officers, hold interviews, make a panel of candidates selected as suitable for the posts and forward the same to the concerned Ministry for processing the case for approval of Appointments Committee of the Cabinet (ACC). The concerned Ministry would then process the case and forward the proposal to the Establishment Officer, Ministry of Personnel, Public Grievances and Pension who was the Secretary of the ACC for obtaining and conveying the ACC decision on the proposal. The ACC comprises the Prime Minister, the Home Minister and the Minister In-charge of the concerned Ministry. The Secretary, ACC would submit the proposal to the Home Minister and the Prime Minister through the Cabinet Secretary and the decision was finally approved/taken at the level of the Prime Minister and conveyed to the Ministry concerned by the Secretary, ACC. Mr. Arun Jaitley, counsel for the respondent contended before this Court*

¹⁰⁶ Section 2, of Article 74, states: “The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.”

that it cannot enquire into the respective opinion which the Members of the ACC may have expressed while considering cases of such appointments. In this regard, he contended that the decision of ACC was in the nature of advice tendered by the Council of Ministers to the President and, therefore, the Court cannot enquire the question as to what advice was tendered. He also contended that ACC was constituted to conduct business of the Government as stipulated by Article 77 and its business was deemed to be a decision of the Council of Ministers and was in the nature of aid and advice to the President. Rejecting the contention, this Court *inter alia* held as under:

“20.It has, however, to be borne in mind that what is debarred to be enquired into is the aid and advise and not the material on which the advise is tendered by the Council of Ministers. That material cannot be said to be part of the advise and it is thus outside the exclusionary rule enacted in Article 74(2) of the Constitution (See: *S.P. Gupta & others Vs. Union of India & Ors*, and *R.K. Jain Vs. Union of India & others*). Further, such an appointment does not call for any aid and advise to the President as contemplated by Article 74(1). It is only an appointment in the name of the President which is altogether a different matter. Such appointments cannot be said to be based on the advise of the Council of Ministers to the President and thus these appointments cannot be said to be protected under Article 74(2).....”

“In view of the pronouncement of the Division Bench, there is no escape from the conclusion that the decision of the ACC in the matter of promotion of a Government servant does not constitute advice of the Ministers to the President within the meaning of Article 74 of the Constitution and, therefore, cannot be withheld if it is otherwise accessible under the provisions of the Right to Information Act....The information to be made available to the respondents shall also include the reasons for the decision taken by the ACC. The material on the basis of which the said decision was taken, however, need not be disclosed, if it was not sought by the respondents. If, however, they seek such material, it cannot be withheld, after a decision taken by the Council of Ministers is implemented. It is, however, made clear that a Cabinet decision, wherever such decision constitutes advice of Ministers to the President in terms of Article 74 of the Constitution, cannot be accessed under the provisions of the Right to Information Act.” (Emphasis added) (***HC-DEL UoI vs. PKJain 2013***)

While holding that the decisions of the Appointments Committee of the Cabinet are not exempt from disclosure by virtue of Article 74 of the Constitution, the Delhi High Court went on to reiterate that if a cabinet decision constituted advice given by ministers to the President, as specified in Article 74 of the Constitution, such a decision would not be accessible under the RTI Act.

Clearly, this restriction is meant to keep the advice given to the President by the council of ministers outside the adjudicatory purview of courts, and therefore bars the courts from considering it. It is not clear how, from this, it follows that such advice would, for ever and ever, not be accessible to the sovereign people of India. The restriction imposed in section 8(1)(i), in terms of an embargo on public disclosure till the decision has taken effect, would apply here also, as any advice given by ministers to the President necessarily contains decisions of the council of ministers. However, once the decision has been communicated, which incidentally is binding on the President, barring one reference for reconsideration, there seems to be nothing in the Constitution or the RTI Act preventing its disclosure.

b) Proactive disclosure of facts and reasons

Section 8(1)(i) allows access specifically to the decisions of the council of ministers, along with the reasons thereof and the materials on which these decisions were based, after the decision has been taken and the matter is over. It talks about these being “made public”, which could be understood to mean “proactively disseminated”. But even if “made public” is understood to mean “made accessible to public”, when section 8(1)(i) is read with section 4(1)(c) and (d), there seems to be an obligation to disclose all this proactively.

Section 4(1) (c) & (d) read as follows:

“4. (1) Every public authority shall—

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*“c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;
d) provide reasons for its administrative or quasi-judicial decisions to affected persons.”*

Though the obligation under section 4(1)(c) to make public all relevant facts while formulating important policies might not apply because of the embargo put by section 8(1)(i) on release of information till the decision has been taken and the matter is complete, or over, it would certainly become operative once that happens.

Interestingly, this is also an example of information that is not exempt for all time, but only for a specific period (see discussion in chapter 17).

c) Agenda for action

- i. The cabinet secretariats must start fulfilling their obligations under section 4(1)(c) and (d) of the RTI Act, and proactively put the details of decisions of council of ministers and of the cabinet, both central and state, in the public domain as soon as they take effect.
- ii. Perhaps the ICs should specifically and formally require the Central Cabinet Secretariat and the state cabinet offices to do so.
- iii. If required, a specific judicial order should be solicited towards this end.

20. Unwarranted invasion of privacy [S. 8(1)(j)]

Section 8(1)(j) of the RTI Act:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, —

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(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.”

Major Issues

This is perhaps the most commonly used exemption in the RTI Act. Unfortunately, the RTI Act does not define “personal information”, “public activity or interest”, “unwarranted invasion”, or even “public interest”. This has resulted in exceedingly imaginative invocation of this exemption.

This lack of definitions is exacerbated by the fact that there is no privacy law in India yet, and therefore most of these definitions are not well settled in jurisprudence. In many other countries where there are strong transparency laws, there are also strong privacy or data protection laws that not only define what is private and what is public, and under what circumstances, but contain strong disincentives, in terms of penalties, against violating privacy.

Also, cultural factors play an important role in determining where privacy starts. Traditionally, in most matters, India has not had a very privacy oriented culture. Therefore, it is rare for Indians to demand that their contact details, or their professions, their qualifications, and even incomes, be closely guarded secrets. Telephone numbers and residential addresses are all in the public domain, through web based telephone directories and voters lists. It is only recently, with the profusion of mobile phones and the concurrent growth of tele-marketing, that people are beginning to demand protection from unwanted callers.

Though there has been some move globally towards establishing more stringent regimes for privacy, through privacy and data protection laws, the proliferation of social media and the internet, especially platforms like *Facebook* and *Twitter*, along with many others, are breaking through even the traditional barriers of privacy.

Public servants in India, as also in many other countries, have less privacy than members of public under transparency laws, and various other laws. Their emoluments are on public display, under section 4(1) of the RTI Act, as are the assets and liabilities of the elected representatives, through the election commission. Judges of the Supreme Court and the high courts, and many other functionaries, like information commissioners, have voluntarily declared their assets and liabilities on the web. However, income tax returns remain inexplicably outside the purview of the RTI Act.

There has been an unfortunate tendency among PIOs, supported by the adjudicators, to keep public servants’ professional evaluations secret from the public. Only recently, public servants (except in the military¹⁰⁷) have been given access to their own evaluations, but no third party can access them. One of the critical justifications offered for such secrecy is that public disclosures would embarrass those who have not performed well. But in many other walks of life, including examinations, selections for jobs, and even

¹⁰⁷ As stated by the Supreme Court in *Abhijit Ghosh Dastidar vs Union Of India & Ors.*, on 22 October, 2008

competing in the Olympic games, the performance of participants is made public. So what is so special about public servants.

Also, could not the possibility of such public embarrassment be an incentive for public servants to perform better? In any case, there is great public interest in knowing whether the best performing and hence the most deserving public servants are getting promoted and occupying sensitive and critical positions, or are other, less deserving public servants being favoured, for perhaps the wrong reasons.

a) Assets and incomes

There are confusing signals emerging from adjudicators on disclosing under the RTI Act the assets and incomes of public servants. On the one hand, orders of the Supreme Court and election laws require candidates standing for elections to declare their assets and liabilities to the Election Commission, which in turn makes them available not only under the RTI Act, but also proactively through its website. since 2004.

The Supreme Court has mandated this through two orders. In ***SC Union of India v. Association for Democratic Reforms 2002***, the SC directed the Election Commission to call for information from all candidates seeking election to Parliament or a State Legislature, and from their spouses and dependants, about their assets. The order stated that:

“.....there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruptions by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not miscomputed himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed. For this purpose, learned counsel Mr. Murlidhar referred to the practice followed in the United States and the form which is required to be filled in by a candidate for Senate which provides that such candidate is required to disclose all his assets and that of his spouse and dependents. The form is required to be re-filled every year. Penalties are also prescribed which include removal from ballot.”

Similarly, in ***SC PUCL 2003***, while examining the plea that contesting candidates should not be required to disclose the assets and liabilities of their spouses as it would violate the right to privacy of the spouses, the SC held that the fundamental right to information of a voter and citizen is promoted when contesting candidates are required to disclose the assets and liabilities of their spouses. The SC ruled that when there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right, as the latter serves a larger public interest:

“It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same.....By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse benami is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well...;”

Even judges of the Supreme Court, along with many other functionaries of the government, have been publicly disclosing their assets and liabilities, and those of their spouses and dependents, on the web. Besides, the RTI Act mandates the proactive disclosure, by all PAs, of the “monthly remuneration received by each of its officers and employees”. Nevertheless, the Supreme Court concurrently seems to consider some of this information as private and therefore exempt.

In **SC Girish Ramchandra 2012**, the Supreme Court upheld the decision of the CIC, of a single judge and of a division bench of the Delhi High Court denying information regarding a serving public servant’s emoluments and assets, including income-tax returns and details of gifts received by him. The SC held that these were exempt under section 8(1)(j) of the RTI Act as this information was private information, the disclosure of which had “no relationship to any public activity or public interest”.

“14. The details disclosed by a person in his income tax returns are “personal information” which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.

15. The petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.”

16. We are, therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, we are not inclined to entertain this special leave petition. Hence, the same is dismissed.”

Though legally the SC order overrides all HC orders, it is interesting to note that there have been some differing opinions among High Courts, strengthening the belief that there are other legally legitimate viewpoints.

In **HC- P&H DP Jangra 2011**, the Punjab and Haryana High Court held that the assets of a public servant were a matter of public interest and cannot, therefore, be exempted under section 8(1)(j).

“5...Ex facie, the argument of the learned Counsel that since the information with regard to movable and immovable properties and expenditure etc. is a personal information of the Petitioner, which cannot be supplied and is exempted under Section 8(e)(j) of the Act, so, the impugned orders are liable to be set aside, is not only devoid of merit but misplaced as well.

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“ 16. A co-joint reading of the aforesaid provisions would reveal, only that information is exempted, the disclosure of which, has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the authorities are satisfied that the larger public interest justifies the disclosure of such information. Meaning thereby, as all the essential ingredients of exemption clause are totally lacking, therefore, the Petitioner cannot claim its exemption. The information contained in the property statement has direct relationship with the public employment of the Petitioner and cannot possibly be termed as unwarranted invasion of his privacy. Therefore, to my mind, the information sought by the Respondent with regard to the sanctions, expenditure, movable and immovable properties of the Petitioner, cannot possibly be termed to be exempted information, as escalated under Section 8(e)(j) of the Act, particularly when, what is not disputed here is that the Petitioner being a public servant was required and submitted his detailed properties statement, as per conduct rules and the authorities under the Act, are (legally) duty bound to supply such information to Respondent No. 5 in this relevant behalf.”

Similarly, in **HC-UTT Om Prakash 2011**, the High Court held that as details about a public servant’s assets were required by law to be submitted to the government, and as the public servant would own these by means of his earning as a public servant, it cannot be held that the details of his assets are private or that their disclosure has no relationship to any public activity or interest.

“3. In the appeal, Appellant is contending, by referring to Section 8(1)(j) of the Right to Information Act, 2005, that both the informations, directed to be furnished, are personal informations and, accordingly, those could not be directed to be disclosed. According to us, Section 8(1)(j) applies to such informations which are so personal in nature that the same have no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of an individual. Therefore, in order to be personal information, in terms of Section 8(1)(j), the information must not have any relationship to any public activity or interest or that the same would cause unwarranted invasion of the privacy of an individual. In as much as, by law, it is a requirement on the part of the Appellant to furnish informations pertaining to his assets to his employer and, in as much as in order to become an employee of the State of Uttarakhand, Appellant was required to give an option, it cannot be said that the informations, thus furnished, would cause unwarranted invasion of the privacy of the Appellant. The list of assets, to be furnished, are to be owned by the Appellant and he would own the same by means of his earnings as a public servant. At the same time, to serve in the State of Uttarakhand, Appellant was required to opt for the State of Uttarakhand and such option has direct bearing with public activity or interest.

“4. In the circumstances, it cannot be said that the informations directed to be given are such personal informations which could not be directed to be disclosed without holding out that disclosure thereof is in the larger public interest. We, accordingly, find no justification in interference with the direction for disclosure of those informations.”

There is clearly a need to have a wider public debate on the question of whether assets and incomes of public servants, and their performance as public servants, has any ‘relationship to any public activity or interest’, and whether their disclosure serves any public interest.

The preamble of the RTI Act states that the RTI Act is being set up “in order to promote transparency and accountability in the working of every public authority, ... and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed...”.

Given that section 4(1)(b)(x) of the RTI Act requires every public authority to ‘publish within one hundred and twenty days from the enactment of this Act... the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations’, it is not clear how the salary got by an employee can be considered to be exempt from disclosure.

Further, one of the few recognised ways that a public servant can be convicted for corruption, under the Prevention of Corruption Act 1988, is if his or her assets are disproportionate to known sources of income. Therefore, if one of the explicitly stated objectives of the RTI Act is to “contain corruption”, then surely public disclosure of the income and assets of a public servant are essential if members of the public are expected to help in identifying those public servants whose assets or lifestyles are disproportionate to their declared sources of income.

Major objectives of transparency laws include facilitating public involvement and support in efforts at ‘containing corruption’, and holding governments ‘and their instrumentalities accountable to the governed’. Given the publicly admitted high levels of corruption among public servants in India, it is clearly in public interest to enable the public to assist in the war against corruption.

Besides, as assets of those standing for elections are made public, a ruling that the assets of public servants are a private matter with ‘no relationship to any public activity or interest’ might well be unconstitutional, for it would seemingly fall foul of Article 14 of the Constitution, which guarantees equality to all before the law. How can one category of public servants, even before they are so elected, be required to publicly declare their assets, while another category of public servants is allowed to keep its assets secret.

Many countries require public disclosure of asset declarations by various categories of public servants. Over 90 countries decree that some categories of public servants publicly declare at least some information about their assets. Nearly 40 countries insist that all of their civil servants publicly declare all of their assets¹⁰⁸.

¹⁰⁸ See the following websites, all accessed during December 2016.
<https://agidata.org/Pam/QuickLinksByEntireDataset.aspx>

Recognising the need for probity, the Lokpal & Lokayuktas Act, 2013, in its original form, also required all public servants to declare their assets. The law also contained the further provision that all these declarations would then be put on the web so that they could be publicly accessed.

"44. (1) Every public servant shall make a declaration of his assets and liabilities in the manner as provided by or under this Act.

(2) A public servant shall, within a period of thirty days from the date on which he makes and subscribes an oath or affirmation to enter upon his office, furnish to the competent authority the information relating to—

(a) the assets of which he, his spouse and his dependent children are, jointly or severally, owners or beneficiaries;

(b) his liabilities and that of his spouse and his dependent children.

(3) A public servant holding his office as such, at the time of the commencement of this Act, shall furnish information relating to such assets and liabilities, as referred to in subsection (2), to the competent authority within thirty days of the coming into force of this Act.

(4) Every public servant shall file with the competent authority, on or before the 31st July of every year, an annual return of such assets and liabilities, as referred to in sub-section (2), as on the 31st March of that year.

(5) The information under sub-section (2) or sub-section (3) and annual return under sub-section (4) shall be furnished to the competent authority in such form and in such manner as may be prescribed.

(6) The competent authority in respect of each Ministry or Department shall ensure that all such statements are published on the website of such Ministry or Department by 31st August of that year."

Recently, there has been a strong reaction from bureaucrats, and from a section of dissenting non-governmental organisations, to this public declaration of their assets and liabilities under the Lokpal & Lokayuktas Act. The bureaucrats were seemingly objecting to the requirement of declaring the assets of their dependent family members, mainly citing privacy concerns. While the NGOs seemed to be against their board members, trustees and office bearers being required to declare their assets, and the assets of their dependant family members, reportedly because they feared that this would further enable the government to oppress and persecute them, as is their wont.

The dissenting NGOs are perhaps not taking into cognizance the fact that the government already has access to information relating to everyone's assets and liabilities, as these have to be provided to them in income tax returns, and through their powers to access bank accounts, or property registration, or even insurance policies. Therefore, they already have the wherewithal to oppress and persecute them.

If their income and assets are put in the public domain, it would actually make it more difficult for the government to selectively target people or organisations, as the public would then be able to highlight the fact that what they were persecuting one group for what was actually common to many other NGOs, who were not being investigated.

In July 2016, the Lokpal Act was amended, removing the requirement of disclosing assets of spouses and dependent children of public servants, and the requirement to put the information on the website. The above quoted section 44 from the original Act has been replaced by a much more cryptic section 44 with the government now retaining the exclusive monopoly in deciding the form and manner of asset disclosure by different categories of public servants:

"44. On and from the date of commencement of this Act, every public servant shall make a declaration of his assets and liabilities in such form and manner as may be prescribed."

<http://www.right2info.org/testing/deleted-stuff/asset-declarations>

http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Using_AD_for_PEP_identification.pdf

<https://agidata.org/pam/ProfileIndicator.aspx?c=90&i=3343>

b) Evaluation of professional performance

In **SC Girish Ramchandra 2012**, the Supreme Court upheld the decision of the CIC, of a single judge and of a division bench of the Delhi High Court denying information regarding copies of memos of censure or show cause notices, and enquiry reports regarding the officer. The SC held that these were exempt under section 8(1)(j) of the RTI Act as this information was private information, the disclosure of which had “no relationship to any public activity or public interest”.

“13. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression “personal information”, the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

In **SC RK Jain 2013**, the Supreme Court adjudicated on a matter where an RTI applicant had requested for copy and inspection of a particular file that contained information regarding adverse entries in the annual confidential report (ACR) and follow up action, if any, pertaining to a public servant. The CPIO, first appellate authority and the CIC rejected the request citing unwarranted invasion of privacy under section 8(1)(j). In appeal, a single judge of the Delhi HC referred it back to the CIC stressing that the issue at stake was whether larger public interest justified the disclosure of the asked for information.

On appeal, a division bench of the Delhi High Court held that the asked for information was exempt from disclosure under section 8(1)(j). The SC, concurred with this decision of the HC:

“6... The learned Single Judge while observing that except in cases involving overriding public interest, the ACR record of an officer cannot be disclosed to any person other than the officer himself/herself, remanded the matter to the Central Information Commission (CIC for short) for considering the issue whether, in the larger public interest, the information sought by the appellant could be disclosed. It was observed that if the CIC comes to a conclusion that larger public interest justifies the disclosure of the information sought by the appellant, the CIC would follow the procedure prescribed under Section 11 of Act.”

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*“17. In view of the discussion made above and the decision in this Court in **Girish Ramchandra Deshpande (supra)**, as the appellant sought for inspection of documents relating to the ACR of the Member, CESTAT, inter alia, relating to adverse entries in the ACR and the ‘follow up action’ taken therein on the question of integrity, we find no reason to interfere with the impugned judgment passed by the Division Bench whereby the order passed by the learned Single Judge was affirmed. In absence of any merit, the appeal is dismissed but there shall be no order as to costs.”*

In a later order by the Delhi High Court, **HC-DEL THDC 2014**, two issues are raised. First, whether the applicant could be given his own ACR. The HC concurred with the CIC and held that he could be. Second, whether minutes of the departmental promotion committee (DPC) were exempt under 8(1)(e) and 8(1)(j), and here the HC ruled that they were, but referred the matter back to the CIC to determine whether there was larger public interest justifying their disclosure. However, the HC also mandated that if the CIC decided to order disclosure, then notice must be served on the third party u/s 11(1) and 19(4).

“9.1 The same, however, cannot be said with regard to the objection taken on the ground that the information was “personal information” which, had no relationship with any public activity or interest or that it would cause unwanted invasion into the privacy of other employees as envisaged under Section 8(1)(j) of the RTI Act. The order of the CIC is cryptic and sans reasons. The impugned direction contained in the CIC’s order in paragraph 6 only adverts to the fact that

such a directive had been issued in other cases and, therefore, the petitioner ought to be supplied information with regard to DPC proceedings. Reasons are a link between the material placed before a judicial/quasi-judicial authorities and the conclusions it arrives at. (See Union of India vs. Mohan Lal Capoor, MANU/SC/0405/1973: 1974 (1) SCR 797 at page 819 (H) and 820 (B, C & D)]. The failure to supply reasons infuses illegality in the order, and thus deprives it of legal efficacy. This is exactly what emerges on a bare reading of the impugned order.

9.2 I must, however, note, at this stage, the contention of Mr. Malhotra that the information contained in the DPC minutes would advert to the ACR gradings of the other employees who may wish to object to the said information being disclosed to the respondent, and if, the CIC was of the view that such information ought to be disclosed in public interest, notwithstanding the intrusion into the private domain of other employees, the procedure prescribed under Section 11 of the RTI Act ought to have been followed. The argument being: notice ought to have been issued to the employees who would then, have taken a call, as to whether or not they would want to oppose the disclosure of information pertaining to them, contained in the DPC proceedings.

10. Having regard to the contentions raised before me by learned counsel for the parties, I am of the view that the interest of justice would be served if the direction of the CIC contained in paragraph 6 of the impugned order is set aside and the matter remanded for a denovo hearing by the CIC. It is ordered accordingly. The CIC shall hear and dispose of the appeal of the respondent which arises from her 2nd application dated 14.8.2009 after giving due notice to the petitioner to file a reply and put forth its stand before it through its representative or counsel. The petitioner would be free to raise objections, amongst others, with regard to provisions of Section 8(1)(j) and Section 11 of the RTI Act as they are only an issue of law, which are based on the very same set of facts, on the basis of which, objection under Section 8(1)(e) is taken by the petitioner. The CIC would also have regard to the judgments cited by the parties including the judgment of the Supreme Court in the case of Girish Ramchander Deshpande Vs. CIC and Anr., MANU/SC/0816/2012: (2012) 9 SCALE 700, and the judgment of this Court in Arvind Kejriwal vs. CPIO Officer & Anr. MANU/DE/3888/2011: 183 (2011) DLT 662 and R.K. Jain vs. UOI, MANU/DE/1751/2012 : 2012 V AD (DEL) 443 as affirmed by the Division Bench Judgments of this Court.”

Whereas one can argue that establishing fairness in selections and promotions certainly serves a larger public interest, and therefore the CIC can consider this, it is not clear whether insisting on notice u/s 11 is required. For though the minutes of the DPR relate to the third party, they have certainly not been treated as confidential by the third party. In fact, it is not clear how one determines if information not provided by the third party, though relating to him or her, like for example the assessment reports by superiors, has been “treated as confidential” by the third party (see also chapter 21 for a more detailed discussion on third party interests).

These orders of the SC and HC raise another important controversy surrounding the making public of details of the professional performance of civil servants. Surely an important aspect of governance is to ensure that meritorious public servants are being rewarded, and deviant ones punished. Equally important is the need to ensure that the right sorts of public servants are being promoted to higher responsibilities and appointed to critical positions, so that the people of India have access to best possible governance. And if this is an important, perhaps even a crucial, aspect of governance, should not the people of India have a right to monitor this aspect and demand accountability from those responsible.

But how can this be done if the service records, especially adverse findings and enquiry committee reports, along with action taken reports, are not in the public domain. How else can the people of India ensure that hard working, efficient and honest public servants, and not those with patronage or money power, are moving up in their profession, being given increasing responsibilities, and being posted to important positions.

In a democracy, governments are ultimately answerable to the people, as are the employees of the government, who are thereby known as “public servants”. Also, the primary, perhaps the sole, objective of

governments is to serve the interests of the public and, as such, the public has a right to know if these interests are being served well, and by the right people.

Undeniably, there can be discomfort among individual officers if their professional performance assessments are made public, but surely the discomfort of a few poorly performing officers should not be allowed to override the paramount and critical public interest outlined above. As has been stressed in **SC Centre for PIL 2011**, the institution is more important than the individual. In this order, the SC also stressed the relevance of the past performance of an official, especially charges and complaints against the officer, for the appointment of the officer to future positions.

The fact that the Supreme Court and various High Courts have themselves had to intervene from time to time to set aside inappropriate appointments or politically motivated promotions, transparency in performance assessments would certainly support efforts towards accountable and honest governance. This is especially so for, in many cases, like the one relating to the controversy about the appointment of P. J. Thomas as the central vigilance commissioner (**SC Centre for PIL 2011**), the matter was first brought to the notice of the courts through public interest litigation by members of the public.

“33...Appointment to the post of the Central Vigilance Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision making process of the recommendation [see para 88 of N. Kannadasan (supra)]. The decision to recommend has got to be an informed decision keeping in mind the fact that CVC as an institution has to perform an important function of vigilance administration. If a statutory body like HPC, for any reason whatsoever, fails to look into the relevant material having nexus to the object and purpose of the 2003 Act or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness [see State of Andhra Pradesh v. Nalla Raja Reddy (1967) 3 SCR 28]. Under the proviso to Section 4(1), the HPC had to take into consideration what is good for the institution and not what is good for the candidate [see para 93 of N. Kannadasan (supra)]. When institutional integrity is in question, the touchstone should be “public interest” which has got to be taken into consideration by the HPC and in such cases the HPC may not insist upon proof [see para 103 of N. Kannadasan (supra)]. We should not be understood to mean that the personal integrity is not relevant. It certainly has a co-relationship with institutional integrity. The point to be noted is that in the present case the entire emphasis has been placed by the CVC, the DoPT and the HPC only on the bio-data of the empanelled candidates. None of these authorities have looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC. Moreover, we are surprised to find that between 2000 and 2004 the notings of DoPT dated 26th June, 2000, 18th January, 2001, 20th June, 2003, 24th February, 2004, 18th October, 2004 and 2nd November, 2004 have all observed that penalty proceedings may be initiated against Shri P.J. Thomas. Whether State should initiate such proceedings or the Centre should initiate such proceedings was not relevant. What is relevant is that such notings were not considered in juxtaposition with the clearance of CVC granted on 6th October, 2008. Even in the Brief submitted to the HPC by DoPT, there is no reference to the said notings between the years 2000 and 2004. Even in the C.V. of Shri P.J. Thomas, there is no reference to the earlier notings of DoPT recommending initiation of penalty proceedings against Shri P.J. Thomas. Therefore, even on personal integrity, the HPC has not considered the relevant material. The learned Attorney General, in his usual fairness, stated at the Bar that only the Curriculum Vitae of each of the empanelled candidates stood annexed to the agenda for the meeting of the HPC. The fact remains that the HPC, for whatsoever reason, has failed to consider the relevant material keeping in mind the purpose and policy of the 2003 Act. The system governance established by the Constitution is based on distribution of powers and functions amongst the three organs 39 of the State, one of them being the Executive whose duty is to enforce the laws made by the Parliament and administer the country through various statutory bodies like CVC which is empowered to perform the function of vigilance administration. Thus, we are concerned with the institution and its integrity including institutional competence and functioning and not the desirability of the candidate alone who is going to be the Central Vigilance Commissioner, though personal integrity is an important quality. It is the independence and impartiality of the institution like CVC which has to be maintained and preserved in larger

interest of the rule of law [see Vineet Narain (supra)]. While making recommendations, the HPC performs a statutory duty. Its duty is to recommend. While making recommendations, the criteria of the candidate being a public servant or a civil servant in the past is not the sole consideration. The HPC has to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner. Whether the institutional competency would be adversely affected by pending proceedings and if by that touchstone the candidate stands disqualified then it shall be the duty of the HPC not to recommend such a candidate. In the present case apart from the pending criminal proceedings, as stated above, between the period 2000 and 2004 various notings of DoPT recommended disciplinary proceedings against Shri P.J. Thomas in respect of Palmolein case. Those notings have not been considered by the HPC. As stated above, the 2003 Act confers autonomy and independence to the institution of CVC. Autonomy has been conferred so that the Central Vigilance Commissioner could act without fear or favour. We may reiterate that institution is more important than an individual. This is the test laid down in para 93 of N. Kannadasan's case (supra). In the present case, the HPC has failed to take this test into consideration. The recommendation dated 3rd September, 2010 of HPC is entirely premised on the blanket clearance given by CVC on 6th October, 2008 and on the fact of respondent No. 2 being appointed as Chief Secretary of Kerala on 18th September, 2007; his appointment as Secretary of Parliamentary Affairs and his subsequent appointment as Secretary, Telecom. In the process, the HPC, for whatever reasons, has failed to take into consideration the pendency of Palmolein case before the Special Judge, Thiruvananthapuram being case CC 6 of 2003; the sanction accorded by the Government of Kerala on 30th November, 1999 under Section 197 Cr.P.C. for prosecuting inter alia Shri P.J. Thomas for having committed alleged offence under Section 120-B IPC read with Section 13(1)(d) of the Prevention of Corruption Act; the judgment of the Supreme Court dated 29th March, 2000 in the case of K. Karunakaran v. State of Kerala and Another in which this Court observed that, "the registration of the FIR against Shri Karunakaran and others cannot be held to be the result of malafides or actuated by extraneous considerations. The menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities and in such cases probes conducted are required to be determined on facts and in accordance with law". Further, even the judgment of the Kerala High Court in Criminal Revision Petition No. 430 of 2001 has not been considered. It may be noted that the clearance of CVC dated 6th October, 2008 was not binding on the HPC. However, the afore-stated judgment of the Supreme Court dated 29th March, 2000 in the case of K. Karunakaran vs. State of Kerala and Another in Criminal Appeal No. 86 of 1998 was certainly binding on the HPC and, in any event, required due weightage to be given while making recommendation, particularly when the said judgment had emphasized the importance of probity in high offices. This is what we have repeatedly emphasized in our judgment – institution is more important than individual(s). For the above reasons, it is declared that the recommendation made by the HPC on 3rd September, 2010 is non-est in law." (Emphasis added)

The ability of the public to monitor the suitability of critical appointments, at the state and central levels, requires that the public have access to information regarding the performance, experience and assessment of public servants. Without this, for every suspect appointment that is questioned because somehow the relevant information has become public, there would be hundreds that remain unquestioned by default.

In any case, a decision to select or appoint someone and not others is a decision by a public authority that affects the public, apart from affecting all those who were not appointed. Therefore, all relevant facts of all such decisions and the reasons thereof, must be proactively disclosed as per section 4(1)(c) and (d) of the RTI Act, which states:

“4(1) Every public authority shall—

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- c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;”
- d) provide reasons for its administrative or quasi-judicial decisions to affected persons.

It seems from the above that “all facts” and reasons about decisions relating to the promotion, retention, or appointment of public servants, which clearly affect the public, need to be proactively disclosed. This is

essential in order to 'promote transparency and accountability', which is an avowed and explicitly stated objective of the RTI Act.

Interestingly, a query asking for the records relating to the non- appointment of former CJIs as Chairperson of the NHRC (see Box 11) evoked a very frank and direct response from the Ministry of Home Affairs. Many would argue that the strategy of "naming and shaming"¹⁰⁹ has been an age-old and widely accepted strategy for preventing and controlling corruption.

If the concern here is that the evaluation of professional performance is often not carried out fairly or correctly, and therefore efficient and honest officials might get publicly disgraced for no fault of theirs, then the focus should be on improving the system of evaluation, and not on shrouding it in secrecy. In fact, the making public of such evaluations would motivate both those seemingly unfairly evaluated, and concerned members of the public, to fight harder to improve the system.

Box 11: NHRC Appointment

F.No. 15011/29/2009-HR-III
Ministry of Home Affairs
Human Rights Division

1st Floor, A Wing, Lok Nayak Bhawan
Khan Market, New Delhi, the 15th
March, 2010.

To

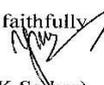
Shri Subhash Chandra Agrawal
1775, Kucha Lattushah, Dariba,
Chandni Chowk,
DELHI-110006

Subject: Appointment of NHRC Chairperson.

Sir,

Reference is invited to your e-mail dated 18th December, 2009 on the subject cited above. It is true that both Mr. Justice R.C.Lahoti and Mr. Justice Y.K.Sabharwal were eligible for appointment to the post of Chairperson, NHRC as per the provisions of the Protection of Human Rights Act, 1993. However, it was recorded in our notes, that their acceptance to the post is doubtful. In the case of Justice R.C.Lahoti the then Home Secretary had spoken to the learned Judge enquiring about his availability for the post. It appears that Mr. Justice Lahoti indicated that he was otherwise very busy and would not be in a position to accept the offer.

Because of the adverse media and other reports with regard to Mr. Justice Y.K.Sabharwal, it was felt that the highly sensitive post of Chairperson NHRC may not be offered to him. Accordingly, it was recorded on the file that Mr. Justice R.C.Lahoti and Mr. Justice Y.K. Sabharwal 'are not inclined/not available for different reasons'. As the offer of the post was made to Mr. Justice Lahoti, orally there is no correspondence recorded between the Union Government and Mr. Justice Lahoti. However, the conversation between them had been reported by the then Home Secretary to the Home Minister.

Yours faithfully

(T.K. Sarkar)
Section Officer

c) *Privacy issues relating to examinations and selections*

Relating to examinations, a concern raised was regarding the disclosure of corrected answer sheets to anyone other than the examinee herself (paragraph 24, **SC CBSE 2011**):

"One of the duties of the fiduciary is to make thorough disclosure of all relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer-books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer-books to anyone else."

Overall, the main worry seemed to be that the making public of such answer sheets might be an unwanted invasion of the privacy of the examinees, which would be one of the legitimate concerns in a

¹⁰⁹ Recently the Income Tax Department of the Government of India publicly announced that it would name and shame publicly those who evade taxes or default in paying them – news story (accessed 30 May 2016) at <http://economictimes.indiatimes.com/wealth/tax/income-tax-department-to-name-and-shame-crorepati-defaulters-this-fiscal/articleshow/52421542.cms>

Surely what is permissible and efficacious for the public should also be applicable to errant public servants.

fiduciary relationship. However, ordinarily no private information is required to be given in an answer sheet and, in fact, usually it is expressly forbidden in order to prevent an examiner from identifying individual examinees. In any case, if the examinee is forewarned that her answer sheet would be made public, they can refrain from disclosing any private information in the answer sheet. Also, they could be required to waive privacy concerns and accept disclosure as a precondition for giving that examination. In exceptional cases, section 10 of the RTI Act allows for redaction of any information that might nevertheless be considered exempt.

The Delhi High Court, in *HC- DEL UPSC 2011*, held that the qualifications and experience of examinees applying for a job cannot be considered to be private. The HC held that an applicant to a public post deserves to know why he or she has not been selected and another has¹¹⁰. However, this order was subsequently overturned by the Supreme Court (see discussion in chapter 21 (b)(iii)).

d) Privacy of public authorities

In *HC-DEL Jamia Millia 2011* the Delhi High Court held that public authorities cannot *per se* have private information. It went on to hold that agreements made between a public authority and any other person or entity would certainly be a public activity. Every citizen has a right to know on what terms the agreement has been reached.

“17. No public authority can claim that any information held by it is personal. There is nothing personal about any information, or thing held by a public authority in relation to itself. The expression personal information used in Section 8(1)(j) means information personal to any other person, that the public authority may hold. That other person may or may not be a juristic person, and may or may not be an individual. For instance, a public authority may, in connection with its functioning require any other person whether a juristic person or an individual, to provide information which may be personal to that person. It is that information, pertaining to that other person, which the public authority may refuse to disclose, if it satisfies the conditions set out in clause (j) of Section 8(1) of the Act, i.e., if such information has no relationship to any public activity or interest vis-a-vis the public authority, or which would cause unwarranted invasion of the privacy of the individual, under clause (j) of Section 8(1) of the Act. The use of the words invasion of the privacy of the individual instead of an individual shows that the legislative intent was to connect the expression personal information with individual. In the scheme of things as they exist, in my view, the expression individual has to be and understood as person, i.e., the juristic person as well as an individual.

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20. Alternatively, even if, for the sake of argument it were to be accepted that a public authority may hold personal information in relation to itself, it cannot be said that the information that the petitioner has been called upon to disclose has no relationship to any public activity or interest.

21. The information directed to be disclosed by the CIC in its impugned order is the copies of the Agreement/settlement arrived at between the petitioner and one Abdul Sattar pertaining to Gaffar Manzil land. The petitioner University is a statutory body and a public authority. The act of entering into an agreement with any other person/entity by a public authority would be a public activity, and as it would involve giving or taking of consideration, which would entail involvement of public funds, the agreement would also involve public interest. Every citizen is entitled to know on what terms the Agreement/settlement has been reached by the petitioner public authority with any other entity or individual. The petitioner cannot be permitted to keep the said information under wraps.”

e) Agenda for action

- i. What should be private and what should not, and under what circumstances, certainly needs an extensive public debate and perhaps codification in a privacy law, so that it is not left to varying

¹¹⁰ Relevant extract from HC order in annexure 7(f).

and arbitrary interpretations. Public interest must be the primary test of all privacy claims and even the most legitimate claims for personal privacy must give way to larger public interests.

- ii. The Supreme Court should be petitioned to review its order holding that assets and liabilities of public servants are exempt from the RTI Act.
- iii. The Parliament should be petitioned to restore Section 44 of the Lokpal & Lokayuktas Act, 2013 to its original form, to ensure public declaration of the assets and liabilities of all the public servants covered under the law.
- iv. The SC should be petitioned to review its order restricting the public disclosure of details relating to the performance and official conduct of a public servant.
- v. If this does not succeed, Parliament should be petitioned to appropriately amend the laws and rules, so that details about the performance and official conduct of all public servants would become accessible under the RTI law.
- vi. Civil society groups should initiate public debates and discussions regarding public interest in disclosure of assets, performance information, examination related information, and other such.

21. Exceptions to the exemptions [S. 8(2) read with 8(1), S. 8(3)]

Section 8(1), (2), & (3) of the RTI Act:

“8(1)

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Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.”

“8(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.”

“8(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.”

Major Issues

There are three types of overarching exceptions that the RTI Act provides to most of the exemptions listed in various sections, specifically in section 8(1) of the RTI Act. The first qualifies all the exemptions to disclosure of information listed under section 8(1) by laying down that information that cannot be denied to Parliament or to a state legislature cannot be denied to any person. This reminds the government that the Parliament and state legislatures represent the people, and are elected by them, so whatever they are entitled to know, the people, whom they represent, are also entitled to know.

The second overarching exemption mandates that notwithstanding all else, the final and all pervasive test for disclosing information is public interest, and if its disclosure serves greater public interest than its withholding, then such information must invariably be disclosed, irrespective of most other exemptions in the RTI Act, and irrespective of the Official Secrets Act.

The primary, perhaps the sole, responsibility of governments is to serve and further public interest. Their main challenges include identifying what is in public interest, balancing between the interest of various segments of the public, determining what is the best method by which public interest can be served, identifying and mobilising the resources required to serve public interest, and developing and maintaining systemic, institutional, and individual capacity towards this common end. Consequently, all information held, generated or collected by governments must be used to this end, and the decision to keep it secret or make it public must also be determined in terms of what best serves public interest. This universally valid but mostly forgotten truth is manifested in section 8(2) of the RTI Act.

The third is the provision of the RTI Act that removes, on information that refers to matters that are over twenty years old, the applicability of most of the exemption clauses listed in sub-section 8(1). When the draft RTI bill was being discussed among civil society groups, a group of historians had raised the valid point that if the exemptions listed under sub-section 8(1) were to be in force for perpetuity, then it would be very difficult for the public to get access to old records, and at best a very tedious and time consuming process. This was one of the concerns behind the formulation of section 8(3).

a) *The Parliamentary access exception*

The override, to the exemptions listed in section 8(1), that no person can be denied information that cannot be denied to Parliament or the state legislature, is a powerful and a relatively clear override. There are detailed rules that specify what types of questions can be raised, for example by Members of Parliament. One such set of rules, regulating question that can be raised in the lower house of Parliament, is given in annexure 5.

Unfortunately, this exception is not widely known or invoked. This might partly be due to the fact that though, in the official version of the RTI Act this provision is correctly shown to be a part of sub section 8(1)¹¹¹, in many commercial copies of the RTI Act it has been shown to be right-indented and aligned with 8(1)(j), thereby wrongly suggesting that it is a part of 8(1)(j), and therefore not applicable to the whole of 8(1) but only to 8(1)(j). In fact, even the CIC website, when checked in November 2016, carried a copy of the RTI Act with the incorrect indentation.¹¹² Perhaps this inadvertent printing error has denied this provision its rightful place in jurisprudence.

There are some HC orders that have taken cognisance of this provision. In ***HC-DEL Col. VK Shad 2012***, the HC held that the information being asked for by the respondents was such that it could not be denied under section 8(1)(e), especially because the information being sought could not be denied to a state legislature or to the Parliament:

“22.1 Having regard to the above, I am of the view that the contentions of the petitioners that the information sought by the respondents (Messers V.K. Shad & Co.) under Section 8(1)(e) of the Act is exempt from disclosure, is a contention, which is misconceived and untenable. For instance, can the information in issue in the present case, denied to the Parliament and State Legislature. In my view it cannot be denied, therefore, the necessary consequences of providing information to Messers V.K. Shad should follow.”

Similarly, in ***HC-P&H Hindustan Petroleum Corporation Ltd. 2011***, the HC held that the information asked for by a respondent, relating to number of LPG consumers, procedures for booking commercial cylinders, etc. cannot be exempted either on the plea of commercial confidence or of fiduciary relationship. The HC went on to conclusively hold that as this information could not be denied to Parliament or a state legislature, it cannot be denied to the respondent:

“20. To my mind, the information sought by Respondent No. 2 with regard to M/s Rajesh Gas Service, an authorized distributor of LPG, such as number of consumers, who use domestic LPG cylinders with home-delivery, without home delivery facilities, for commercial purpose number of LPG cylinders received from HPCL, LPG Plant, Jind, during the period 1.10.2008 to 31.12.2008 and procedure of booking system for domestic cylinders etc. cannot possibly be termed either to be the information of commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party or available to a person in his fiduciary relationship and the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual. Moreover, the CIC was satisfied that larger public interest justifies the disclosure of such information. Since the information sought cannot be denied to the Parliament or the State Legislature, so, the same cannot also be denied to Respondent No. 2, as contemplated in the proviso to section 8 of the Act.” (Emphasis added)

A similar understanding of the law is reflected in ***HC-MAD The Registrar General vs. R.M. Subramanian 2013***, wherein the Madras High Court held that whenever a decision was being taken to deny information under section 8(1)(e), among other things it must be determined whether the information was such that it could be denied to Parliament and state legislatures.

“52. It cannot be gainsaid that Section 8(1) of the Right to Information Act, 2005 deals with 'exemption' from disclosure of information in regard to matters falling under (a) to (j) and further Section 8(2) and (3) of the Act refers to the Public

¹¹¹ <http://rti.gov.in/rti-act.pdf> - page 7

¹¹² http://cic.gov.in/sites/default/files/RTI-Act_English.pdf

Authority who may allow the access to information if public interest in disclosure outweighs the harm to the protected interests etc. In fact, the Competent Authority as per Section 2(e)(iii) and (h) of the Act speaks of 'Competent Authority' and 'Public Authority'. ... While denying the information as required under Section 8(e) of the Right to Information Act, 2005, the undermentioned facts can be taken into account by the concerned authority. They are as follows:

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(b) Whether the information is such that can be refused/denied to Parliament or State Legislature;

(c) Whether public interest in disclosure earns the protected interest;”

What follows from this, at the very least, is the requirement that all orders denying any information under section 8(1), or upholding such a denial, must contain a definitive statement that the denied information is such that it would also be denied to Parliament or to a state legislature, and give relevant reasoning to support this judgement.

b) Public interest override

Perhaps section 8(2) is the most powerful of the overrides, for it gives absolute discretion to the PA and the IC to set aside any of the exemptions listed in 8(1), if it was thought that public interest so warranted.

i) Ignoring section 8(2): Despite this, none of the SC or HC orders under discussion adjudicate on section 8(2) of the RTI Act. This is especially surprising because section 8(2) is applicable to all clauses under section 8(1) – from 8(1)(a) through to 8(1)(j). It is also applicable to information exempted under the Official Secrets Act, 1923, and reinforces section 22 of the RTI Act, which states somewhat more categorically that “*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923....*”

Given its overall applicability on section 8(1), it would have been expected that at least in the eight SC orders from among those being discussed here, which dealt with exemptions under section 8(1), the question of weighing public interest against harm to protected interest should have been considered.

As it happens, the issue of public interest was raised, but only in cases dealing with commercial confidence (S. 8(1)(d)), fiduciary relations (S. 8(1)(e)), and privacy (S.8(1)(j)). Perhaps this was because each of these clauses specifically contain a public interest override, over and above the more comprehensive public interest override provided by section 8(2).

The suspicion that 8(2), with its very wide ranging ramifications, has escaped notice in jurisprudence is strengthened by reading portions of **SC ICAI 2011**. Therein, the SC held that from among the ten categories of information that were exempted under section 8(1), clauses (a) to (j), six of the clauses carried “absolute exemption”. Of the remaining four, three: (d), (e), and (j), contained conditional exemption, as the exemption was conditional to public interest test, while (i) had an exemption that was valid for only a specific period of time:

“19. Among the ten categories of information which are exempted from disclosure under section 8 of RTI Act, six categories which are described in clauses (a), (b), (c), (f), (g) and (h) carry absolute exemption. Information enumerated in clauses (d), (e) and (j) on the other hand get only conditional exemption, that is the exemption is subject to the overriding power of the competent authority under the RTI Act in larger public interest, to direct disclosure of such information. The information referred to in clause (i) relates to an exemption for a specific period, with an obligation to make the said information public after such period. The information relating to intellectual property and the information available to persons in their fiduciary relationship, referred to in clauses (d) and (e) of section 8(1) do not enjoy absolute exemption. Though exempted, if the competent authority under the Act is satisfied that larger public interest warrants disclosure of such information, such information will have to be disclosed. It is needless to say that the competent authority will have to record reasons for holding that an exempted information should be disclosed in larger public interest.” (Emphasis added).

From the above it seems that the SC was not made aware of the broad scope of section 8(2), for otherwise they would not have attributed “absolute exemption” for clauses 8(1)(a), (b), (c), (f), (g), and (h), nor distinguished them in this manner from the remaining 8(1)(d), (e), and (j).

In **SC RBI 2015**, however, the Supreme Court, while discussing the introduction of the RTI bill in Parliament, stated that during discussion of the bill in Parliament it was clarified that though various exemptions were provided in “Clause 8(a) to (g)”¹¹³ however there were exceptions provided to these clauses, specifically that, where necessary, information would be divulged if it is “in the interest of the State” – presumably the public. Clearly, at least in **SC RBI 2015** the Supreme Court recorded the correct position that every clause of section 8(1) had a public interest applicable to it. The fact that this was a part of the Parliamentary debate, as recorded by the Supreme Court, should make it amply obvious that this was what Parliament intended:

“48...We had a lengthy discussion and it is correctly provided in the amendment Under Clause 8 of the Bill. The following information shall be exempted from disclosure which would prejudicially affect the sovereignty and integrity of India; which has been expressly forbidden; which may result in a breach of privileges of Parliament or the Legislature; and also information pertaining to defence matters. They are listed in Clause 8 (a) to (g). There are exceptions to this clause. Where it is considered necessary that the information will be divulged in the interest of the State, that will be done”. (Emphasis added)¹¹⁴.

The recognition that all exemptions to disclosure under section 8(1) are subject to the public interest test, as prescribed in section 8(2), has certain legal implications. The most important of these is that all orders denying, or upholding the denial, of any information under 8(1) must contain a specific statement that the public interest test has been applied, and mention the basis on which it was decided that the public interest in disclosure does not outweigh the harm to the protected interest.

ii) Defining public interest: As discussed above, given section 8(2)’s wide application and scope, the question of determining what public interest, if any, is served by disclosing various types of information should be asked and answered whenever any of the exemptions under section 8(1) are invoked. Also, where there is public interest in disclosure, it needs to be balanced against the possible harm to the protected interest. Unfortunately, as already mentioned, this happens very rarely, especially in orders of information commissions, who mostly neither raise this question, nor adjudicate on it.

In order to effectively use the public interest test provided in section 8(2), there must be a well settled definition of public interest and a widely-accepted methodology of determining whether public interest outweighs the harm to the protected interest. Unfortunately, the law is silent on these matters and there has been very little debate in the courts. Though in **SC Bihar PSC 2012**, the Supreme Court did attempt to define “public interest” and to indicate how this might be measured, it stated that the term “public interest” was not capable of any precise definition. It then tried to define it, but no clear or easily usable definition seemed to emerge:

“23. The expression ‘public interest’ has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression ‘public interest’ must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. In its common parlance, the expression ‘public interest’, like ‘public purpose’, is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs. [State of Bihar v. Kameshwar Singh (AIR 1952 SC 252)]. It also means the general welfare of the public that warrants recommendation and protection;

¹¹³ Sic. Presumably “j”.

¹¹⁴ The numbering was altered after the Parliamentary debate as some provisions were added, dropped, or modified.

something in which the public as a whole has a stake [Black's Law Dictionary (Eighth Edition)].

“24. The satisfaction has to be arrived at by the authorities objectively and the consequences of such disclosure have to be weighed with regard to circumstances of a given case. The decision has to be based on objective satisfaction recorded for ensuring that larger public interest outweighs unwarranted invasion of privacy or other factors stated in the provision. Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy. Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India.”

Similar efforts by the Madras High Court and the Punjab and Haryana High Court to define public interest have not helped much. In **HC-MAD The Registrar, Thiyagarajar College of Engineering 2013**, the HC stated:

“37. In Black's Law Dictionary (Sixth Edition), 'Public Interest', is defined as follows:

“Public Interest - Something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local State or national government....”

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“40. "Public Interest" means an act beneficial to the general public. Means of concern or advantage to the public, should be the test. Public interest in relation to public administration, includes honest discharge of services of those engaged in public duty. To ensure proper discharge of public functions and the duties, and for the purpose of maintaining transparency, it is always open to a person interested to seek for information under the Right to Information Act, 2005. Therefore, the petitioner-College, a person discharging public duty, in aid of the State, can be brought within the definition of, "public authority". Right to Information has been recognised as a Fundamental Right and that only condition to be satisfied is that the information sought for, should foster public interest and not encroach upon the privacy of an individual or it should be exempted under the Act. In view of the above discussion, the Writ Petition deserves to be dismissed and accordingly, dismissed. No costs.”

In **HC-P&H Vijay Dheer 2013**, the HC held:

“7. The State Information Commission while passing the impugned order has attempted to strike a balance between public interest as also the privacy of the individual concerned i.e. the petitioner. The Public Information Officer concerned has been directed to provide such part of the information sought by respondent No. 3 which primarily relates to the mode of appointment and promotion of the petitioner to a public post. The basis of passing the impugned order by the State Information Commission stands disclosed in the impugned order itself in the following terms:--

“It is necessary in order to understand as to what is the larger public interest vis-à-vis personal information which would cause unwarranted invasion of the privacy of the individual. After considering all relevant aspects in the instant case, I find that the stand/order of the PIO Office ADC (D), Roop Nagar is not tenable. The PIO concerned has unnecessarily stretched the information sought as personal information about third party as unwarranted invasion on the privacy of the individual. A part of information/ documents sought by the complainant, relates to the mode of appointment/promotion of a person on a public post, therefore, information/ documents to

that extent fall under the domain of larger public interest. The documents on the basis of which a person has sought an appointment in a public office becomes the documents of larger public interest.””

“The impugned order has been passed on valid and cogent reasoning and conforms to the scheme of disclosure under the Act. This Court does not find any basis that would warrant interference with the same. The writ petition is, accordingly, dismissed.”

In any case, there seem to be at least three issues that need further public discussion and consideration, regarding the public interest test in section 8(2), and in some of the clauses of section 8(1). First, public interest needs to be defined. Second, the test for balancing it against the harm to protected interests needs to be evolved and broadly accepted. And, third, it needs to be recognised that what is in larger public interest depends on the prevailing circumstances and can differ across time, situation, and location.

In resolving these issues, it must be kept in mind that often information asked for by individuals can also be of interest and relevance to the general public. For example, information sought about the procedures of selection or evaluation, by an individual candidate competing for a job, or by an examinee, might either help reassure thousands of examinees and job applicants that all was well, or alert them about unfair practices, allowing them to initiate remedial action. Therefore, the determination of whether disclosure of any requested information serves a larger public interest should not be made just on the basis of the motivation of the individual seeking it, but on the basis of the potential public interest that could be served if the information was publicly available.

The SC has, in ***SC Bihar PSC 2012***, held that a distinction needs to be made between a private interest and a public interest. It is reasoned that where an examinee or a third party is seeking information about others in order to assess whether they were deservedly given better marks or selected over them for a job, then this is essentially in the private interest of the information seeker and cannot be treated as a public interest.

But another way of looking at this is to see the act of this one information seeker as an individual manifestation of a larger public concern about the integrity of the examination and selection system. In such a case, the addressing of such a concern, either by making public information that would assuage public suspicion, or by exposing and helping correct malpractices, is clearly in larger public interest.

In the Indian situation, there is a pressing and larger public interest for disclosing, for example, all corrected answer sheets, or all documents related to selection for jobs. For one, there has been a lot of dissatisfaction with the examination and selection systems. Recent scams relating to the selection of teachers in Haryana and the so-called “Vyapam scam” in Madhya Pradesh¹¹⁵, relating to the selection of various categories of professionals, has dramatically highlighted the unsatisfactory state of affairs. The Supreme Court had to directly intervene in the examinations leading to entry into medical colleges and even set up a committee headed by a retired Chief Justice of India to oversee the process. And then, again, aberrations like the one recently reported from Bihar (see Box 12) could become much more difficult if all answer sheets, along with the marks awarded, were in the public domain.

Surely moving to a system where all corrected answer sheets are publicly available, preferably computerised or scanned, will go some way towards deterring such scams. Any legal concerns about privacy or fiduciary relationships could easily be met by making it a precondition for admission to such examinations that the examinees agree that all answer sheets would be in the public domain.

Besides, it is unlikely that the making public of corrected examination sheets would ordinarily be detrimental to the well-being of the examinee. However, in keeping with the letter and spirit of the RTI Act, in exceptional cases where there are good reasons for secrecy, that specific record could be exempted. It

¹¹⁵ For details, see <http://indianexpress.com/article/explained/across-the-board-vyapams-spread/> Last accessed on 27th August 2016.

seems legally wrong and even otherwise undesirable to exempt all examination sheets from disclosure just because a few might be legitimately exempt. Perhaps the general principle that needs to be kept in mind, while deciding on universal exemptions, is that where adverse consequences of disclosure might be probable for a few, then it is better to give them specific protection, but where adverse consequences would likely be widespread, then a blanket ban needs to be imposed.

Everything considered, the evidence seems overwhelmingly in favour of allowing public access to corrected answer sheets, preferably proactively and in a computerised form, to build public confidence regarding the examination and selection processes in India, a confidence that has been severely eroded in the last few years.

BOX 12

Results of 2 Bihar toppers null and void after retest

The results of two high-scoring students were on Saturday declared null and void following the retest held by the Bihar School Examination Board (BSEB) for 13 toppers in the Intermediate Board exams.

The performance of the remaining 11 in the retest was found to be “up to the mark.”

Topper in the humanities stream, Ruby Rai, who thought “Prodikal Science” (political science) was all about cooking, has been asked to appear before the Board on June 11 after she skipped the retest on Friday on medical grounds.

‘Not up to the mark’

“The experts panel on Friday did not find the performance of two students, Saurabh Shresth and Rahul Kumar, up to the mark, so their results were declared cancelled,” said BSEB chairman Lalkeshwar Prasad Singh.

Saurabh Shresth had topped whereas Rahul Kumar was third topper in the science stream.

During his retest, when experts had asked Saurabh Shresth about a calculus formula, he told them not to ask him such questions or else “he could commit suicide then and there.”

Saurabh had earlier been caught on camera saying that aluminium was the most reactive element in the periodic table.”

Cancel registration

The BSEB chairman also declared that it had cancelled the registration of the controversial Vishun Rai College in Vaishali district, where most of the toppers came from.

Both Ruby Rai and Saurabh are from the Vishun Rai College.

“We have also recommended a judicial probe into the whole incident. It will be headed by a retired judge of Patna High Court,” Mr. Singh said.

Accessed from The Hindu, 5th June 2016: <http://www.thehindu.com/news/national/other-states/results-of-2-bihar-toppers-null-and-void-after-retest/article8691236.ece>

iii) Public interest in accessing details of other candidates: The Supreme Court has also held, in **SC UPSC 2013**, that for reasons similar to those mentioned above, concerning the access of corrected answer sheets, namely fiduciary relationships and privacy, details of candidates appearing in an examination should not be made public. As mentioned above, whereas this might be justified in a few specific cases, where the appropriate exemptions can be applied, this need not be a universal exemption.

There is clearly a public interest in revealing the names of the candidates who sat for an examination as it would help identify, when results were declared, whether certain candidates were, inexplicably, given their past record, doing better than expected. Also, it would help identify linkages between candidates and examiners and help prevent conflicts of interest. Besides, the list of people who sat for examinations, applied for jobs, were selected, or waitlisted, has historically been in the public domain. There is no evidence to suggest that this has led to any widespread undesirable consequences.

As already suggested above, in order to remove any legal confusion, an examinee could be asked to waive all rights to privacy. There are good reasons to believe that any move to reform the examination and selection systems in India would need this type of transparency.

iv) Public interest in accessing instructions given to examiners regarding grading and correct or model solutions: Again, there seems no reason why all such instructions and questions should be exempt from disclosure. Clearly those whose disclosure would compromise the integrity of the examination system must be exempt. However, as per the spirit and letter of the law, this needs to be established on a case by case basis.

There can be instructions given to examiners which help them to recognise where unfair means have been used by the examinee. In so far as awareness of these indicators would help examinees to disguise their use of unfair means, such instructions need not be disclosed. But it must be remembered that as these instructions go out to hundreds, even thousands, of examiners, it would be extremely unlikely that they are not already in the public domain.

Also, where the answers contain material exempt from disclosure under the RTI Act, for example where it is an examination to promote intelligence officers and they are required to display their knowledge of information gathering techniques, it might not be in public interest to disclose model answers, if any such have been circulated to the examiners. Besides, it would be exempt under section 8(1)(a).

Therefore, unless specific and appropriate reasons are there to exempt any instruction or model answer, the general principles underlying the RTI Act must prevail and information must be made accessible. Access to the principles applied by examiners in order to grade answers would help develop confidence among candidates that the grades they got were fair.

In the recent scams related to examinations, the corruption nexus included the examination evaluators, for it was with their connivance that incorrect marks were awarded. Clearly anonymity and secrecy in the examination processes has failed to curb cheating and corruption, and perhaps the time is ripe for an about turn towards transparency. Even the judiciary has not remained immune from the rot in the examination system, with the results of the 2015 Delhi Judicial Services exam invoking charges of “*corruption, favouritism and nepotism*” in the evaluation process.¹¹⁶ Of the 659 candidates who appeared for the exam, just over 2% were declared successful with records showing that at least 65 sitting judicial officers and 6 toppers of State Judicial Services exams failed the test while 2 of the 11 successful candidate were children of sitting Delhi HC judges.

In fact, with regard to the same judicial exam, the SC, while suggesting certain changes in practices to the manner in which the exam is conducted, stated,

“Before parting with the case, we may state that suggestions have been given so that the candidates, who participate in the examination must have intrinsic faith in the system of examination and simultaneously, they must also appreciate that a candidate, while appearing in an examination, has his/her own limitation. Faith in an institution and acceptance of individual limitation are the summum bonum of a progressive civilised society. We say no more on this score.” (SC Centre for Public Interest Litigation, 2015).

Clearly, as already recognised by the SC, the timing of release of information is important and therefore information can be withheld till its release no longer compromises the examination or selection process.

v) Public interest in accessing income tax records of each other: Income tax is an important source of revenue for the government and therefore it is of vital importance that the tax due to the government is correctly and fully declared and paid. It is also widely acknowledged that there is huge tax evasion in India and thousands of crores of rupees due to the public exchequer are neither declared and paid by the tax payer, nor detected and recovered by tax authorities.

The government has, for many years, been requesting the public to help identify tax evaders and has a scheme whereby a percentage of the evaded tax, that is identified and recovered through the help of a

¹¹⁶ <http://indianexpress.com/article/india/india-others/65-judicial-officers-flunk-delhi-law-exam-thats-under-a-cloud/>

BOX 13

Asian Age, 19th January, 2011, reproducing news from 19th January, 1961

DECCAN CHRONICLE

50 YEARS AGO

'IT assessments to be made public'

S. Nagar: Prime Minister Jawaharlal Nehru announced today that the government of India had decided to make public in future the income-tax assessments. He also announced that the Congress working committee had decided to invite all Congress ministers voluntarily to disclose to the committee the assets they held from time to time and how they went up and down. Mr Nehru was intervening in the Congress Subjects Committee this morning.

member of public, can be given as a reward to the informer¹¹⁷. More recently, there has also been recognition of the fact that the life styles and possessions of people can give a good clue to whether they are evading taxes. In a recent press report, the Income Tax department has reportedly revealed that:

"There are more than 150,000 luxury cars priced upwards of Rs 30 lakh in Delhi alone. But government tax data shows the entire country has just 150,000 people who have declared annual income above Rs 50 lakh.

This is the conundrum facing the income tax department, said a senior official. And to crack it, he added, the taxman will soon start matching your I-T returns with your possessions.

The government has started collecting data from various sources and when this is done and the data has been sifted through, action will begin, the tax official said.

"This drive is a salient feature of the tax department's agenda to curb under-reporting of tax and expand the taxpayer base in the country."¹¹⁸

Clearly, then, the support of the public can be very useful in identifying those whose lifestyle and possessions are incompatible with their declared income in their income tax returns. But this is only possible if the public has access to income tax returns of others. And what harm can it do to the tax payer?

The plea that it will reveal the identity of wealthy people and make them susceptible to criminal extortion or even threats of kidnapping and ransom, seems a bit outlandish. First, there are enough people in this country sporting expensive cars and living lavish lifestyles to provide an endless list to potential extortionists and kidnappers, without needing to research the income tax records. Besides, is it really credible to believe that criminals who are willing to extort and kidnap would not be willing to bribe functionaries in the tax department to get a list of high worth individuals, and that there would be no functionary in the tax department who would succumb to such temptation. Clearly, secrecy cannot be the main or even a

significant defence against these types of threats.

There is also the other argument that often individuals escape from creditors or potential borrowers by claiming that they are broke. This would not be possible if their tax returns are in the public domain. But even to this the earlier arguments about lifestyle and possessions apply. However, even if we accept this as a possible inconvenience to the tax payer, all said and done clearly at the end of the day *"public interest in disclosure outweighs the harm to the protected interests"*.

Interestingly, India's first Prime Minister, Jawaharlal Nehru, had announced, over fifty years back, that the Government of India has decided to make all income tax assessments public in future (see Box 13).

¹¹⁷ See, for example: <http://timesofindia.indiatimes.com/india/Trace-a-tax-defaulter-get-up-to-Rs-15-lakh-reward/articleshow/48727811.cms>

¹¹⁸ Source, Hindustan Times, 9th May, 2016. Accessed on 5th June 2016. <http://www.hindustantimes.com/business/taxman-to-match-declared-income-with-possessions-like-luxury-cars/story-SXQ86n7kneUrBFmIDQU7RM.html>

Perhaps in keeping with this undertaking, the Government of India, in its Finance Bill of 2016, has made an amendment¹¹⁹ that allows the returns and other details of tax payers to be made public if it is considered to be in public interest to do so, at the discretion of the chief commissioner of income tax.¹²⁰

c) Minimising exemptions after twenty years

In the initial RTI Bill presented to Parliament, all exemptions except two, 8(1)(a) and 8(1)(i), were to be lifted after 20 years. While the RTI bill was being discussed in Parliament, the Lok Sabha added 8(1)(c) to the list of exemptions which would be applicable for perpetuity.

The first clause to be retained for perpetuity [8(1)(a)] exempted from disclosure:

“(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;”

This was perhaps understandable, for in matters of state twenty years might not be a very long time, as it is not in diplomacy. Recent disclosures by a retired diplomat, in his memoirs¹²¹, regarding alleged shenanigans in the Bhutanese royal family over fifty years ago, caused diplomatic ripples that would explain the urge to forever seal, in diplomatic bags, the dirty laundry collected from our missions across the world.

Surprisingly, the Parliament insisted on adding 8(1)(c) to the list of exemptions that would be effective in perpetuity. This clause exempts from disclosure:

“(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;”

Considering the Parliament and state legislatures renew themselves every five years, it would be difficult to imagine any information that could cause serious harm by being a breach of privilege after twenty years.

The third exemption that was also somewhat surprisingly, insisted upon to be retained for perpetuity was 8(1)(i), which exempts disclosure of:

“(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;”

One would have thought that after twenty years, all decisions would have long been taken and all matters would have been complete or over. Clearly delays in government are far more momentous than what is commonly believed!

Surprisingly, PIOs and ICs have also misinterpreted this provision to mean that information older than 20 years is no longer accessible under the RTI Act. This is clearly wrong.

In one case before the Assam IC, the applicant had sought information about the re-organization of districts of Assam, specifically a report from the 1970s. After directing the PA to follow up on the information with several departments, the SIC recorded that the report could not be found. The SIC disposed the matter by recording:

¹¹⁹ Story in the Hindu, 7th May, 2016, *Income Tax Dept. can reveal taxpayers' details*. Accessed on 10th June 2016 from <http://www.thehindu.com/business/Economy/income-tax-dept-can-reveal-taxpayers-details/article8566506.ece>

¹²⁰ This, potentially, raises a new legal debate. There is recognition of the fact that even if some information is exempt from disclosure under some other law, like say the Official Secrets Act, but not exempt under the RTI Act, then as per section 22 of the RTI Act, the RTI Act would prevail and the information under question would not be exempt. Interestingly, this case brings the converse up for discussion. What happens if information is considered exempt under the RTI Act (like income tax returns), but is declared accessible under some other law. Would then section 22 of the RTI Act also prevail and this information remain exempt? It would seem so. However, in the case of the Finance Bill discussed above, there is no real clash as section 8(2) of the RTI Act allows public authorities to make public any exempt information that is in public interest to disclose. The interesting thing to determine would be that if any appeal is to be made against the decision of the chief income tax commissioner, would that lie with the information commission or with the courts of law.

¹²¹For more details, see story in the Hindu at <http://www.thehindu.com/news/international/bhutans-royalty-refutes-coup-claims-in-rasgotra-book/article9012409.ece>

"This Commission has already made a lot of effort in retrieving the report of the Kohli Commission regarding re-organization of districts of Assam. However, the report is of 1970s, i.e., more than 20 years from the date of RTI application, which is dated 22-5-2012, and as such outside the purview of the RTI Act, 2005." (SIC/ASS/KP(M).35/2013).

Such an approach is without a legal basis and is in fact contradictory, for if the SIC held that the information was outside the purview of the RTI Act why did it direct the PA to follow up regarding the information from various other PAs? Further, the SIC did not invoke any exemption under the RTI Act, and the sole reason for denying information appears to be that the report dates back to the 1970s. The SIC appears to have misinterpreted section 8(3) of the RTI Act to mean that information older than 20 years need not be provided under the RTI Act, whereas the particular section in fact states that most of the exemptions will be lifted after 20 years, as discussed above.

On the face of it, it would appear that information about the re-organization of districts in a state would be valuable information and would be retained for a long time. However, in its order the SIC appeared to have not sought details of the retention schedule which would have stipulated the time period, for which the particular information should have been retained (discussed in chapter 24(c) of this report).

d) Agenda for action

- i. ICs and other adjudicators need to start rigorously applying the public interest and the non-denial to Parliament test, and directing PAs to do the same. Perhaps seeking the intervention of the judiciary on this issue would also help things along. In each case where the IC upholds denial of information citing an exemption under section 8, it must record that the overarching exceptions in 8(1) and 8(2) were considered and why they were not found to be applicable.
- ii. Keeping all this in mind, it needs to be publicly debated whether there is significant public interest in the disclosure of evaluated answer sheets, details of other examinees and candidates, or even income tax records of each other, and that the harm to protected interests is usually much less than the public interest served.
- iii. Towards this end, it must be ensured that the correct versions of the RTI Act, which shows the Parliament and legislature test as applicable to the whole of section 8(1), is displayed in all official websites and is disseminated to the public.
- iv. The opening of access to information that is over twenty years old, provides a wonderful opportunity which must be strengthened by ensuring that those records that would be of interest to the public, or to some segments of the public, or whose availability would be in public interest or of historical interest, are preserved for the twenty years and then made accessible. ICs must, therefore, systematically review the prevailing rules and practices of PAs relating to the management and destruction of records, to ensure that all relevant documents survive the twenty-year period, and are preserved and accessible thereafter.
- v. Also, ICs should endeavour to involve national and state archives into this task so that the documents that open up after a twenty-year period can be prioritised and the more important ones transferred to the archives. By and large all documents should be microfilmed or scanned before they are allowed to be either destroyed or put into poorly accessible storage.
- vi. Every PA must be required to proactively disclose its rules and processes relating to the management and destruction of records, and listing records that have been sent to the archives or opened up after 20 years.
- vii. Records that are archived or opened up after 20 years must be properly indexed and classified in accordance with the norms laid down, and the norms should be designed to facilitate public access.

22. Redacting exempt information from larger documents [S. 10]

Section 10 of the RTI Act:

“10. (1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

“(2) Where access is granted to a part of the record under sub-section (1), the Central Public Information Officer or State Public Information Officer, as the case may be, shall give a notice to the applicant, informing—

(a) that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;

(b) the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;

(c) the name and designation of the person giving the decision;

(d) the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and

(e) his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided, including the particulars of the senior officer specified under sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be, time limit, process and any other form of access.”

Major Issue

The censoring of documents, especially by blacking out portions to make them unreadable, is a practice followed by many governments and is commonly known as redacting. Where governments or their agencies are required, in response to requests under transparency laws, to publicly disclose documents that contain portions that are exempt from disclosure, a common practice is to publicly release a copy of the document with the exempt portions blacked out. Interestingly, such redaction often takes place even when a full, un-redacted, document is publicly available, though not from authorised sources. This might perhaps be because the government wants to retain deniability. An interesting example of this, from the USA, is reproduced in box 14 at the end of the chapter.

Before the Indian RTI Act became operative, some Indians applied for information about India using the Freedom of Information Act (FoIA) of the USA. Often the documents received had every second line blacked out, as in the document depicted in the box. However frustrating that was, it was better than receiving nothing at all.

a) More honoured in the breach

This is another one of those provisions of the RTI Act that has almost universal applicability but is rarely used. If this section of the RTI Act was properly implemented and applied, then there would hardly be a request for records and documents that could be refused, for in each record, the exempt information or portion would be redacted and the remaining provided. Unfortunately, this has still not caught on in India and the adjudicators do not seem to be insisting on it.

There are no SC or HC orders on the scope and applicability of redaction. But there are some orders where specific redaction has been directed, like **SC CBSE 2011**. Therein the Supreme Court had directed

that the corrected answer sheets of examinees should be given to them but after redacting the names of the examiners.

Essentially, section 10 obliges a public authority not to deny an entire document to an RTI applicant, but to provide the asked for document after redacting the portion(s) that might be exempt. Only in those rare cases where the entire document, including its cover and title, are exempt from disclosure under the RTI Act, could a complete document be denied. In such rare cases, there would have to be a specific statement declaring that the entire document was exempt. Unfortunately, very often adjudicators do not seem to recognise this legal obligation.

Where portions of a document or record are redacted, the provisions of section 10(2), requiring that detailed justification be communicated for the redaction, would go a long way in ensuring that such redaction was not done mindlessly and without adequate justification.

A recent study done by RaaG indicates that information is denied in response to 55%¹²² of the RTI applications filed. Yet in very few of these cases is the exempt information being redacted and the remaining information being provided, or a statement being recorded that all of the information being asked for is exempt.

In *SC Girish Ramchandra 2012*, the Supreme Court upheld the denial of various asked for documents, including copies of income tax returns, without even once agitating the issue whether all the documents sought were exempt in their entirety, or whether only parts of them were exempt and the remaining could be disclosed after the exempt portions were redacted.

There are many similar examples among high court orders. For example, in *HC-DEL Union of India through Ministry of External Affairs 2013*, the Delhi High Court upheld the denial of various documents, including copies of the application for grant of passport as that “*would contain personal details of the passport holder*”¹²³, copy of the old passport “*since it would contain address of the passport holder*”¹²⁴, “*copy of the documents and application submitted by the passport holder ... since they would contain personal information relating to the passport holder. ...reports of the police, since it would contain personal information in respect of the passport holder.*”¹²⁵ Not once did the High Court, while conceding that the asked for documents only “contained” exempt information, raise the possibility, or issue directions, for the exempt portions to be redacted and for the remaining document to be provided to the applicant, as required under section 10(1).

A similar tendency prevails among information commissions and it is rare to find IC orders that have correctly applied the provisions of section 10. Some examples are given below.

An appellant had filed an RTI application seeking information about the position of different types of loans sanctioned and disbursed by a nationalised bank. The PIO denied information on the grounds that the information was not easily available and preparation of such details would disproportionately divert the bank's useful resources and the same would be detrimental to the safety or preservation of the record in question, as per section 7(9) of the RTI Act. The PIO further mentioned that some of the information was exempt under section 8(1)(d),(e) and (j) of the RTI Act. The CIC upheld the decision of PIO and dismissed the appeal, recording:

“The approach of the CPIO was in conformity with the RTI Act. Decision: The order of the CPIO is upheld. Intervention of the Commission is not required in the matter.” (CIC/001084 dated 25.07.2013).

However, by the PIO's own admission, only “some of the information” attracted the exemption clauses under the RTI Act. Therefore, the legally valid position would have been for the IC to direct that the

¹²² Chapter 6, RaaG and CES, 2014, *Op cit*

¹²³ Paragraph 12

¹²⁴ Paragraph 14

¹²⁵ Paragraph 15

particulars which attracted the exemption clauses be severed, as per section 10, and the remaining information be disclosed.

The practice of allowing the withholding of an entire document or record, when only a part of it is actually exempt, could well encourage a tendency among public authorities of ensuring that every bit of information that the PA does not want to disclose is embedded in a document which contains at least some information that is exempt under the RTI Act, thereby leading the adjudicators to exempt the whole document.

b) Agenda for action

- i. The ICs should invariably require PIOs to justify the refusal of a full document or record by establishing that all of it was exempt. Otherwise, they should be legally required to redact the exempt portions and provide the rest of the record or document, or be liable to be penalised.
- ii. In every case where there is full denial of information, the PIO/FAA/IC order must verify that there was no scope for redaction.

Box 14: Redaction example from USA¹²⁶

<p style="text-align: right;">ICD 304</p> <hr/> <p style="text-align: center;">INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 304</p>  <p style="text-align: center;">HUMAN INTELLIGENCE (EFFECTIVE: 6 MARCH 2008) (AMENDED: 9 JULY 2009)</p> <hr/> <p>A. AUTHORITY: The National Security Act of 1947, as amended; Executive Order 12333, as amended; National Security Council Directive 5, U.S. Espionage and Counterintelligence Activities Abroad, 17 February 1972; and other applicable provisions of law.</p> <p>B. PURPOSE</p> <p>1. This Intelligence Community Directive (ICD) addresses clandestine and overt human intelligence (HUMINT) collection obtained both inside and outside the United States and establishes the Director of National Intelligence (DNI) policy to integrate, prioritize, and maximize the Intelligence Community's (IC) HUMINT capabilities; to ensure coordination and deconfliction of HUMINT and counterintelligence operations and activities across the U.S. Government (USG); to promote the use of core common standards for those who engage in HUMINT activities; and to enable greater collaboration across the USG to share services of common concern whenever feasible.</p> <p>2. This Directive delineates the roles and responsibilities of the DNI, the National HUMINT Manager (NHM), and those principal agencies or departments that conduct HUMINT activities.</p> <p>3. This Directive rescinds portions of Director of Central Intelligence Directive (DCID) 5/1¹, Espionage and Counterintelligence Activities Abroad, 19 December 1984; and rescinds DCID 3/2, Coordination of Overt Collection Abroad, 26 November 2001.</p> <p><small>¹ Provisions relating to foreign intelligence liaison and counterintelligence remain in effect until superseded by a DNI directive.</small></p> <hr/> <p style="text-align: center;">Unclassified and publically available on the internet.</p>	<div style="text-align: right; margin-bottom: 10px;">(b)(3)</div> <p style="text-align: right;">ICD 304</p> <hr/> <p style="text-align: center;">INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 304</p>  <p style="text-align: center;">HUMAN INTELLIGENCE (EFFECTIVE: 6 MARCH 2008) (AMENDED: 9 JULY 2009)</p> <hr/> <p>A. (U) AUTHORITY: The National Security Act of 1947, as amended; Executive Order 12333, as amended; National Security Council Directive 5, U.S. Espionage and Counterintelligence Activities Abroad, 17 February 1972; and other applicable provisions of law.</p> <p>B. (U) PURPOSE</p> <p>1. (U//FOUO) [REDACTED]</p> <p>2. (U//FOUO) [REDACTED]</p> <p>3. (U) This Directive rescinds portions of Director of Central Intelligence Directive (DCID) 5/1¹, Espionage and Counterintelligence Activities Abroad, 19 December 1984; and rescinds DCID 3/2, Coordination of Overt Collection Abroad, 26 November 2001.</p> <p><small>¹ (U//FOUO) [REDACTED]</small></p> <hr/> <p style="text-align: center;">UNCLASSIFIED//FOUO</p> <hr/> <p style="text-align: center;">Censored in response to a March 2014 FOIA request.</p>
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¹²⁶ Accessed on 8th August, 2016, from: https://www.google.co.in/url?sa=i&rcrt=j&q=&esrc=s&source=images&ccd=&cad=rja&uact=8&ved=0ahUKFwid_dfh3rHOAhWHMY8KHegmB6MQjRwIBw&url=http%3A%2F%2Fcanonfire.blogspot.com%2F2014%2F04%2Ffor-official-use-only.html&psig=AFQjCNHILSdF0j4YBzhlx-vGRK6A92XKqQ&ust=1470742914657217

23. Safeguarding third party interests [S. 11]

Section 11 of the RTI Act:

“11. (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:”

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision.”

Major Issues

A large number of RTI applications seek information involving third parties, who can be public servants, or members of the public, or even a public authority other than the one from which information is sought. Section 11 essentially seeks to ensure that certain principles of natural justice are not violated and if the information intended to be disclosed is such that it pertains to or has been supplied, and has been treated as confidential, by a third party, then that third party must be given an opportunity to be heard before a decision is finally taken to disclose such information. Unfortunately, section 11 is being widely misunderstood by PIOs and adjudicators. Among other things, they either tend to invoke it for all third party information and not just for that which has been treated as confidential by the third party, or interpret section 11 to give the third party a veto power and not just an opportunity to be heard, and often both.

a) Defining “third party”

Who qualifies to be a third party under the RTI Act? The RTI Act only debars the person making the request from being considered a third party, but specifically includes public authorities (S. 2(n)). There is not much in case law on this question, except in one HC order. In *HC-TRI Dayashish Chakma* the HC holds that citizenship is not relevant while determining third party status.

“19. Who is a third party? It is contended by Mr. Deb that the only third party is a non citizen with regard to whom information is sought and submits that since the respondent No. 5 has disputed the citizenship of the petitioner, he is not a third party. We are totally unable to accept this contention.”

In another order (discussed in section e) below) the HC discusses the third party rights of a dead person, and an interesting dilemma emerges.

b) Scope

The RTI Act specifies that section 11 becomes operative (and notice therefore has to be given to the third party) when the information being asked for is such that it *“relates to or has been supplied by a third party and has been treated as confidential by that third party”*. The first issue is, how should this be read? Should it be read as:

- a) (relates to or has been supplied by a third party) and (has been treated as confidential by that third party). In other words, in determining whether section 11 is applicable to an RTI application, it should first be determined:
 - i. whether the information being asked for either relates to, or has been supplied by, a third party,
 - ii. and if it either relates to or has been supplied by a third party, then has it been treated as confidential by the third party.

Consequently, if it is neither related to nor supplied by a third party, then no section 11 notice is required to be sent.

Further, even if it either relates to or has been supplied by a third party, but has not been treated as confidential by that third party, then no notice needs to be given under section 11.

Only where it has been treated as confidential by, and relates to or supplied by, a third party, does a notice have to be issued under section 11.

- b) (relates to) or (has been supplied by a third party and has been treated as confidential by that third party). In other words, if:
 - i. Either the information related to a third party, or
 - ii. Has been supplied by a third party and treated as confidential by that third party.

In either case, notice will be issuable under section 11.

On the face of it, option a) appears to be the correct way of understanding this provision. There are many reasons for this. First, the language suggests that “relates to” and “has been supplied by” both qualify “third party”. Consequently, “and” is inclusive of both and qualifies both “relates to” and “supplied by”.

Second, there seems no reason why, only if it is supplied by a third party, does the confidentiality clause become relevant, and not if it relates to a third party. So, for example, medical information “relating to” a third party might be supplied to an employer, or an insurance company, or a hospital, by an examining doctor, and not by the third party herself. Should not such information attract the same sort of caution, whether directly supplied by the third party or not, if it relates to the third party?

Third, if interpretation b) above is adopted, then a PA would have to send a notice each time any information “related to” any third party was asked for, irrespective of whether it was treated as confidential or not. A large proportion of the information being asked for relates to third parties, and PAs would be swamped just sending out section 11 notifications and dealing with the responses. Imagine if someone asks for a list of all the women who were elected to Parliament in the last two elections, along with their constituencies and their date of election. By opting for interpretation b) above, the PA would have to send section 11 notices to all of them. And it would not help that this information was already in the public domain, for such an interpretation of the RTI Act would require a section 11 notice even if no confidentiality was involved. This would clearly be an unworkable and meaningless interpretation.

c) Confidentiality

What does it mean to say “*treated as confidential by that third party*”? On the one hand, does it mean that if the third party has written confidential on any document or explicitly stated that any bit of information is confidential, that is enough to kick start section 11 notices. But this could again result in PAs getting unnecessarily overwhelmed by section 11 notices, which incidentally provide for an appeal by the third party to the first appellate authority and information commission (section 11(4) read with Sections 19(2) and 19(4)), thereby also overwhelming the appellate bodies. It would also delay enormously the whole process of accessing information. Therefore, should not this clause be interpreted to inherently include “and received in confidence by the PA”, so that only information that is essentially confidential in nature should be so received in confidence by a PA, and only if the PA is authorised, and has the facilities, to receive and handle confidential information.

Perhaps the main intent of the confidentiality clause was to ensure that a confidential document originating from one public authority, whose copy was in the possession of a second public authority, was not dispensed to the public by the second public authority without consulting the originating authority. This was understandable, for the second public authority might not have the background or expertise to assess whether any of the exemptions under section 8(1) were attracted by the said confidential document. This also seems to be the interpretation that the DoPT adopts in a circular¹²⁷ memo to all departments and ministries:

“The undersigned is directed to say that the Government, in a number of cases makes inter departmental consultations. In the process, a public authority may send some confidential papers to another public authority. A question has arisen whether the recipient public authority can disclose such confidential papers under the RTI Act, 2005. If yes, what procedure is required to be followed for doing so.

2. Section 11 of the Act provides the procedure of disclosure of 'third party' information. According to it, if a Public Information Officer (PIO) intends to disclose an information supplied by a third party which the third party has treated as confidential, the PIO, before taking a decision to disclose the information shall invite the third party to make submission in the matter. The third party has a right to make an appeal to the Departmental Appellate Authority against the decision of the PIO and if not satisfied with the decision of the Departmental Appellate Authority, a second appeal to the concerned Information Commission. The PIO cannot disclose such information unless the procedure prescribed in section 11 is completed.

3. As defined in clause (n) of Section 2 of the Act, 'third party' includes a public authority. Reading of the definition of the term, 'third party' and Section 11 together makes it clear that if a public authority 'X' receives some information from another public authority 'Y' which that public authority has treated as confidential, then 'X' cannot disclose the information without consulting 'Y', the third party in respect of the information and without following the procedure prescribed in Section 11 of the Act. It is a statutory requirement, non-compliance of which may make the PIO liable to action.”

Clearly, just classifying some information or marking some document as confidential does not make it so. Even in the pre-RTI Act days, there were restrictions on who could classify information as being confidential, who could receive and maintain confidential information, the manner in which it was to be maintained and, most important, what types of information could be classified as confidential¹²⁸. Therefore, it was not left to the whims and fancy of people within or outside the government to classify whatever they liked as confidential.

¹²⁷ NO. 8/2/2010-IR dated 27th April, 2010. On page 112 of *Compilation of OMs & Notifications on Right to Information Act, 2005*. DoPT, Government of India. 2013

¹²⁸ These are specified in the *Manual of Departmental Security Instruction* circulated by the Ministry of Home affairs, and amended from time to time.

After the enacting of the RTI Act, and specifically the presence of section 22, which states: “*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act*” the term “confidential” got redefined. Therefore, whereas earlier documents were classified under the Manual of Departmental Security Instruction issued and modified, from time to time, by the Ministry of Home Affairs, and the penalties for disclosing secret documents were enforced under the Official Secrets Act, now only those matters could be considered confidential that were exempt under one or more of the exemptions to disclosure provided for in the RTI Act.

In this sense, when the RTI Act says in section 11 that “it has been treated as confidential by the third party”, it can only be understood to mean “treated as exempt from disclosure as per the RTI Act”.

d) Process for releasing third party information

A close reading of section 11 suggests that a notice is required to be issued only when the PIO intends to disclose information that relates to or is supplied by a third party and treated as confidential by the third party. This means that section 11 is activated only after the PIO has already considered the various exemptions and has concluded that none of them apply, or even if they prima facie apply, the exceptions to the exemptions (public interest or parliamentary provision) dictate disclosure. Therefore, the idea of section 11 is to give the third party an opportunity to be heard and to present for the PIO’s consideration facts and arguments pertinent to the matter.

Further, section 7 of the RTI Act clearly states that the PIO is only obligated to keep in view the submission of the third party, and that the request for information can be rejected only for reasons listed under section 8 or 9. Section 7 states

“7. (1) ... the ... Public Information Officer..., on receipt of a request ...shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9.

.....(7) Before taking any decision ...the ...Public Information Officer ..., shall take into consideration the representation made by a third party under section 11.”

Therefore, a composite reading of the third party clause, and the processes laid down in the law, makes it unambiguous that the third party can only make a representation regarding the decision of the PIO to disclose the information. Certainly, no veto power has been given to the third party. The third party can, of course, file an appeal against the decision of the PIO or the FAA.

The PIO can only deny information by citing provisions of section 8 or 9. In order to invoke third party, the PIO has to show intent to provide information i.e. arrive at a finding that section 8 and 9 do not apply. Therefore, in case the PIO denies information after hearing the submissions of the third party, the burden lies on the PIO to show how the submissions obtained from the third party persuaded the PIO to accept that the information sought is exempt under section 8 or 9, and that the various overrides do not apply. This is also in keeping with section 19(5) which has specified that in any appeal proceedings the onus is on the PIO to justify the denial of information.

Despite at least one SC order to the contrary, many IC orders have interpreted section 11 to provide a veto power to the third party. It has been suggested that if the third party objects to the information being disclosed, then that is adequate ground for refusal.

The Supreme Court, in ***SC RK Jain 2013***, held that:

“13. On the other hand Section 11 deals with third party information and the circumstances when such information can be disclosed and the manner in which it is to be disclosed, if so decided by the Competent Authority. Under Section 11(1), if the information relates to or has been supplied by a third party and has been treated as confidential by the third party,

and if the Central Public Information Officer or a State Public Information Officer intends to disclose any such information or record on a request made under the Act, in such case after written notice to the third party of the request, the Officer may disclose the information, if the third party agrees to such request or if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.”

In effect, the Supreme Court held that if the third party is willing, then no issue remains. However, even if the third party does not agree, or does not respond, the PIO can still release the information if public interest in disclosure outweighs possible harm to the third party.

Essentially, the views sent by the third party, in so far as they are relevant, would help the PIO to decide whether public interest outweighs potential harm. In no way does this provide a veto power to the third party. Also, the invocation of the third party would only occur if the information was such that it was both treated as confidential by the third party, and considered fit for disclosure by the PIO. If either of these two conditions were missing, then section 11 would not come into play.

The critical issue here is to determine the meaning of “confidential”. When can some information be legitimately considered confidential?

As discussed above, after the enactment of the RTI Act, only those matters can be considered confidential that are exempt under one or more of the exemptions to disclosure provided for in the RTI Act. Therefore, in section 11 information being “*treated as confidential by the third party*”, can only be understood to mean information that is exempt from disclosure under the RTI Act.

If this is so, then when any third party information is sought, what the PIO has to first determine is whether it is exempt under the RTI Act. If it is not, then it cannot be legitimately treated as confidential by anyone and no rights of the third party survive. The information can then be disclosed.

However, if it is exempt, under any one of the exemptions, most commonly under 8(1)(j), then the PIO must determine whether, either as specifically provided for in section 8(1)(d), (e), or (j), or as generally provided for in section 8(2), public interest justifies the disclosure, or the parliamentary proviso dictates disclosure. If, and only if, the PIO concludes that the information ought to be disclosed, then the law mandates that the PIO should give an opportunity to the third party to be heard before making a final decision. This is in keeping with the principles of natural justice. But, clearly, if the information being dealt with is not exempt in the first place, then principles of natural justice do not require that the third party must be heard on the matter.

In any case, if the RTI Act was to be understood to provide a right to be heard to all third parties, whether the information involved was exempt or not, then this would result in chaos. Similarly, if the RTI Act was interpreted to hold that every person had a right to treat any or all information as confidential, and thereby acquire the right to be heard every time such information was up for public disclosure, then this would not only result in chaos but seriously cripple the right to information. Surely that could not be the purpose of Parliament in providing the right to be heard to third parties.

Therefore, if the rights of the third party and the obligations of a PIO are understood in the way described above, then the only issue that the third party could contribute to in responding to the notice under section 11 was on the quantum of harm, if any, that would be caused by the disclosure of the sought for information. This would help the PIO to decide whether the harm would be greater or less than the public interest involved in disclosure.

The Gujarat High Court has expressed a similar view in ***HC-GUJ Rajendra Vasantlal Shah 2010:***

“8. Before dealing with the issue, one aspect can be tackled at this stage. It was canvassed before the authorities, by Respondent No. 4 that its case falls under Section 11(4) of the R.T.I. Act. I am of the opinion that Section 11 only provides for a procedure, for dealing with the request for supplying information, when such information concerns a third party. In such a case, the Public Information Officer has to issue a notice to such third party, granting him hearing and

pass an order, as may be found proper. Section 11 of the R.T.I. Act neither creates any substantial right to information in favour of an Applicant nor does it provide any independent exemption, making an exception to such a right to information. Such an exception has to be found in Section 8 of the R.T.I. Act, which provides for various exemptions from disclosure of information. Case of the Respondent No. 4, therefore, shall have to fall under Clause (e) or (j) of Sub-section (1) of Section 8 of the R.T.I. Act, if it were to succeed in opposing the application of the Petitioner.”

Despite this, in several IC orders just the fact that a third party has protested, or not given permission, is held to be adequate grounds for upholding the denial of information. Some typical orders are summarised below.

In an appeal against an order denying information, taking the plea of it being third party information, the CIC upheld the denial, without any reasoning.

“On careful perusal of the respondents reply (supra) it is revealed that the appellant was denied the required information under the shelter of third party, as defined u/s 11 of the RTI Act 2005...the Commission is of the considered view that “plea of third party” taken by the respondents appears to be legally tenable.” (CIC/000769 dated 11.03.2014)

In another case, in response to an RTI application, the PIO and FAA denied information citing the third party’s refusal to disclose it. The CIC, in its order, concurred with the interpretation of the PIO that if the third party refused disclosure, then unless there was larger public interest in disclosure, the information was liable to be denied.

“It was submitted that information sought regarding claim papers of ‘Nand Service Station’ is ‘third party’ information and need not be disclosed to the RTI applicant. Further under Section 11 of the Act, 3rd. party had refused to allow such disclosure... The Commission upholds CPIO and FAA order as third party information may not be disclosed in the absence of any larger public interest.” (CIC/000141 dated 21.01.2014)

In yet another matter, the CIC upheld denial of information on the grounds that it related to a third party, and was not of public interest:

“The respondent stated that this particular copy of the letter is not available with them. The respondent stated that the CPIO in his reply of 28.09.2012 had already responded that the information sought related to third party and not of public interest... The order of the respondent CPIO is upheld.” The procedure prescribed under Section 11 does not appear to be followed and no exemption under Section 8 or 9 was cited to deny information. (CIC/000322 dated 12.12.2013)

e) Third party rights of dead people

An interesting conundrum remains. What happens if a person asks for information about whether a third party is alive or dead? Clearly it is information relating to a third party, and yet if notice is given and the third party responds objecting to the revelation, then the third party’s existence is confirmed, even if the RTI query is rejected. And if the third party does not respond, then there is no reason to withhold the information. So either way the information is revealed. This is not a hypothetical case but based on an actual matter before the Delhi High court in ***HC-DEL Union of India Vs. Adarsh Sharma 2013***:

“3. ... However, in my view, if an information of the nature sought by the respondent is easily available with the Intelligence Bureau, the agency would be well-advised in assisting a citizen, by providing such an information, despite the fact that it cannot be accessed as a matter of right under the provisions of Right to Information Act. It appears that there is a litigation going on in Rajasthan High Court between the respondent and Dr. Vijay Kumar Vyas. It also appears that the respondent has a serious doubt as to whether Dr. Vijay Kumar Vyas, who was reported to have died on 03.09.2009, has actually died or not. The Intelligence Bureau could possibly help in such matters by providing information as to whether Dr. Vyas had actually left India on 10.10.2009 for Auckland on flight No CX708. Therefore, while allowing the writ petition, I direct the Intelligence Bureau to consider the request made by the respondent on administrative side and take an appropriate decision thereon within four weeks from today. It is again made clear that information of this nature cannot be sought as a matter of right and it would be well within the discretion of the Intelligence Bureau whether to supply such

information or not. Whether a person aggrieved from refusal to provide such information can approach this Court under Article 226 of the Constitution, is a matter which does not arise for consideration in this petition”.

The HC does not state under what provision of the RTI Act the seeking of information on whether a person is alive or dead, is exempt from disclosure. This is also not clear from a reading of the RTI Act. Perhaps it could be argued that a dead person also has a right to privacy, and therefore has protection under section 8(1)(j), but surely not regarding whether the person is dead or not. Besides, the RTI Act is only accessible to persons or citizens, and a dead person is neither. But then should not the law allow access to information that allows one to determine whether the person about whom information is being sought is protected under the RTI Act or not. At least it is clear that a dead person can no longer seek protection under section 8(1)(g) – endangering of life and physical safety!

f) Agenda for action

- i. Given the widespread misuse of this provision of the law, for one or more of the reasons listed, the ICs should issue clear directions instructing PIOs on the correct interpretation of the provisions of this section. Once such directions are issued by the ICs, the DoPT and corresponding departments in state governments should circulate these to all the PAs within their jurisdiction.
- ii. They must also clarify that all information, or even information that might be marked as confidential by a third party, cannot be treated as confidential for the purpose of the RTI Act. The acceptance of information as confidential must clearly be justified on the basis on one or more of the relevant clauses of section 8(1), and only for the specific time period that it gets covered under one or more of those clauses.
- iii. Even then, the response of the third party must be treated as an input to be considered in finally determining whether the information asked for should be disclosed or not. The final decision must be that of the PIO, based solely on the balancing of public interest with probable harm. And non-response by the third party cannot be a reason to refuse, or even delay, the provision of information. The ICs should also make both these points clear in the earlier mentioned circular, which should then be circulated to all PAs by the DoPT and concerned state departments.

PART V. TRANSPARENCY INFRASTRUCTURE AND PROCESSES

24. Effective ICs [S. 12 (5)&(6)/15 (5)&(6); 18(2),(3), & (4); 19(8); 20(2)]

Sections 12(5)&(6); 15(5)&(6); 18(2), (3), & (4); 19(8); and 20(2) of the RTI Act:

12/15(5) The [Central/State] “...Chief Information Commissioner and” [Central/State] “...Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.”

12/15(6) The [Central/State] “...Chief Information Commissioner or an [Central/State] Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.”

18(2) Where the Central Information Commission or State Information Commission, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof.

(3) The Central Information Commission or State Information Commission, as the case may be, shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;
- (b) requiring the discovery and inspection of documents;
- (c) receiving evidence on affidavit;
- (d) requisitioning any public record or copies thereof from any court or office;
- (e) issuing summons for examination of witnesses or documents; and
- (f) any other matter which may be prescribed.

(4) Notwithstanding anything inconsistent contained in any other Act of Parliament or State Legislature, as the case may be, the Central Information Commission or the State Information Commission, as the case may be, may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public authority, and no such record may be withheld from it on any grounds.

19(8) In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—

- (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—
 - (i) by providing access to information, if so requested, in a particular form;
 - (ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;
 - (iii) by publishing certain information or categories of information;
 - (iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;
 - (v) by enhancing the provision of training on the right to information for its officials;
 - (vi) by providing it with an annual report in compliance with clause (b) of sub-section (1) of section 4;

(b) require the public authority to compensate the complainant for any loss or other detriment suffered;

(c) impose any of the penalties provided under this Act;

(d) reject the application.”

“20(2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

Major Issues

Perhaps the three most critical factors determining the efficacy of information commissions is the composition of the commissions, how empowered they are, and their methods of functioning. As things stand, there are major issues with each of these: the information commissions are overwhelmingly dominated by former civil servants, the commissions almost universally hesitate to use the powers they have, and the systems and processes adopted by commissions are not always optimal for overcoming prevailing challenges.

a) Composition of information commissions

The composition of information commissions is an issue that has been debated right from the time the RTI Act became functional. The RTI Act [S. 13(5) & 15(5)] lays down that the salaries and allowances, and other terms and conditions of service, of the Chief Information Commissioner of the Central Information Commission shall be the same as that of the Chief Election Commissioner, and of central information commissioners and state chief information commissioners the same as that of election commissioners, all of whom are equivalent to judges of the Supreme Court, at No. 9 in the Warrant of Precedence¹²⁹. State information commissioners would be paid and treated at par with chief secretaries of states, who are equivalent to secretaries to the Government of India, at No. 23 in the Warrant of Precedence.

While the RTI Act was being drafted, it was thought by many that it was important to give commissioners a sufficiently exalted status, partly to attract the right sorts of people and partly to help them navigate more effectively through the corridors of power, with the moral authority that a high bureaucratic status brings with it.

One seeming side effect of this has been that these posts have become fervently sought after by retired and retiring civil servants, and it has been alleged that on occasion they have used their official position and their influence within the government to get themselves appointed as information commissioners. A national survey done in 2014¹³⁰ determined that 60% of the information commissioners across the country, and 87% of the chief information commissioners, were former civil servants. Further, 77% of the chief information commissioners across the country were from one service, the Indian Administrative Service (IAS), which is the most powerful of the civil services in India.

¹²⁹ For details of the Warrant of Precedence, see: <http://www.upscguide.com/content/order-precedence-india>

¹³⁰ P 103, charts 9(a), (b), and (c), chapter 9, RaaG & CES, 2014, *Op. cit.*

This is despite the fact that the prescribed qualifications for being appointed a commissioner [S. 12/15(5)] are very broad based and include many types of expertise and experience, of which “administration and governance” is only one.

Incidentally, only 10% of the commissioners, and 5% of the chiefs, were women!

i) Appointing ICs with legal expertise: Whereas there have been recurrent demands from RTI Activists for the appointment of a larger proportion of non-government professionals to the commissions, recently the Supreme Court took cognisance of the functioning of commissions across the country and passed some strong remarks regarding the quality of orders.

When the original Namit Sharma order was given by the Supreme Court (*SC Namit Sharma 2012*) specifying that all matters in the information commission must henceforth be heard by a two-member bench, with one being a judicial member, and that the judicial members of the information commission would be appointed in consultation with the Chief Justice of India or of the respective high courts, it caused wide spread disruption in the functioning of information commissions. Many commissions suspended all hearings as they did not have judicial members and could not set up two-member benches, as directed. There was also concern that if all matters would have to be heard by two-member benches, then the backlog of cases, which was already huge in many commissions, would double. There was also the traditional divide between the executive and the judiciary over control of adjudicatory bodies like the information commissions.

This order went on to hold that information commissions were judicial tribunals and not ministerial ones, and were part of the court attached system of administration of justice. Consequently, members of the commission should have the ability to appropriately perform the adjudicatory and quasi-judicial functions that they are required to perform. The SC further held that all first appellate authorities must also have judicial training.

The SC also issued directions regarding the selection process of information commissioners, directing that the posts must be advertised and the process of selection and appointment must start at least three months in advance of the vacancies coming up.

For some commissions, the fact that the original Namit Sharma order explicitly stated that “*This judgment shall have effect only prospectively.*” (*SC Namit Sharma 2012:106/13*) implied that till judicial members were appointed, the work could carry on as before, but others were more cautious.¹³¹

In *SC UoI vs Namit Sharma 2013*, while reviewing *SC Namit Sharma 2012*, the SC came to the conclusion that the earlier order was mistaken in holding that the functions performed by information commissioners required a judicial mind. Consequently, it held that sub-section 5 of sections 12 and 15 of the RTI Act were not in violation of the constitutional requirements of separation of powers and independence of judiciary. It struck down the directions of the original order that information commissions must have, as members, former Judges of the High Court or the Supreme Court.

The SC further held that any effort to read into section 12(5) and 15(5) of the RTI Act the necessity to appoint former judges as members of commissions would be rewriting the law, which is the purview of Parliament.

The SC similarly held that directions by the court that only those with “basic degrees in the respective fields” be considered for appointment as information commissioners would also tantamount to usurping the law making powers of the legislature.

Nevertheless, on a rather critical assessment of the past performance of information commissions, and following its own dictum, the SC proceeded to suggest to Parliament that they give consideration to the

¹³¹ Relevant extract from the order in annexure 7(g).

suggestion that appointing judicial members to information commissions would improve the functioning of these commissions.

Accordingly, in the review petition the SC struck down almost all the directions given in the original Namit Sharma order, and replaced the direction of appointing legal experts as commissioners with the direction that chief information commissioners must ensure that matters involving intricate questions of law are heard by commissioners who have legal expertise:

“39.6. We also direct that wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.”

The review order also held that restrictions under sub-section 6 of section 12 and 15, specifying that Information Commissioners shall not be MPs or MLAs, or “hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession”, would only apply after a person was appointed to the information commission.¹³²

After **SC UOI vs. Namit Sharma 2013**, which negated almost all the directions of the original order, the question still remains whether information commissions around the country could benefit from having greater judicial expertise than they have at present. As has repeatedly been discussed in this report, many of the orders of ICs are in total disregard of the law. Despite penalties being mandatory under the law, for a host of violations, hardly any of the violations are penalised. Though the law mandates that in all appeal and complaint hearings the onus of proof must be on the PIO, in many cases this is disregarded. The law mandates that if information is not provided in time, it must be provided free of charge, yet this repeatedly ignored and often deliberately violated. The list goes on and on.

Given the reiteration of the order of the seven-Judge Bench in *P. Ramachandra Rao v. State of Karnataka*¹³³:

“Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot trench upon in the field of legislation properly meant for the legislature.”

and the strong legal position taken, especially in the review order, perhaps infusion of information commissions with judicial expertise, discipline and training, would lead to significant improvement. In **SC UoI vs Namit Sharma 2013** the SC observed:

“31. Unfortunately, experience over the years has shown that the orders passed by Information Commissions have at times gone beyond the provisions of the Act and that Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or Information Commissioners or that the persons appointed answer the criteria laid down in Sections 12(5) and 15(5) of the Act but they do not have the required mind to balance the interests indicated in the Act and to restrain themselves from acting beyond the provisions of the Act. This experience of the functioning of the Information Commissions prompted this Court to issue the directions in the judgment under review to appoint judicial members in the Information Commissions. But it is for Parliament to consider whether appointment of judicial members in the Information Commissions will improve the functioning of the Information Commissions...”

This is also reminiscent of an earlier observation of the Supreme Court, albeit well before information commissions came into being, as quoted in **HC-BOM SEBI 2015**:

“3...The Apex Court in S.N. Mukherjee v. Union of India MANU/SC/0346/1990 : [1990] 4 SCC 594 has observed in para 35 as under: --

¹³² Relevant extract from the order in annexure 7(g).

¹³³ Quoted in paragraph 25, **SC UoI vs Namit Sharma 2013**

“... In this regard a distinction has been drawn between ordinary courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.””

Perhaps, all in all, information commissions need to be better balanced bodies having a mix of former civil servants, legal professionals, social activists, academics, journalists and other professionals. Even if decisions are taken by individual members, there should be adequate opportunities to discuss cases with other commissioners, and to informally consult, so that the final orders are a manifestation of all the experience and expertise that a commission, with a varied membership, would be privy to.

ii) Vacancies in information commissions: Though the RTI Act provides for information commissions each having one chief information commissioner and ten information commissioners, most states and, till recently, the Central Information Commission, did not have a full complement of commissioners. Whereas in some of the smaller states the work load is light and therefore it might not be justifiable to have an eleven-member commission, in most of the larger states the back log of cases is large and consequently the waiting period is long, requiring all commissioners to be on board.

As things stand, the delays in information commissions have steadily got longer. In the national study done in 2008, the picture that had emerged was that whereas in 2008 the expected delay before a matter came up for hearing was between less than one month to 29.7 months (approximately 2 and a half years), in 2014 it had risen to from less than one month to 60 years and 10 months. The findings for 2016 can be seen in table VII, chapter 5 of this report.

Partly the vacancies are a result of the apathy and inefficiency of appropriate governments, and often it is due to the process of appointments not being started in time, resulting in delays in filling up vacancies (see chapter 5 for details). There is also an oft voiced suspicion that information commissions are purposely deprived of commissioners as the government does not want the RTI Act to work too well. How far this is true is anybody's guess.

Perhaps legally limiting the size of the information commission to eleven is not the best way to ensure its efficacy. Given the huge and growing delays in many commissions, the number of commissioners required in each commission should be determined on the basis of a realistic assessment of how many cases a commissioner can clear in a month, and how many cases are likely to be received in a month. This would ensure that cases are not pending for more than thirty to forty five days, which should be the maximum period for pendency. Of course, this would also require appropriate support staff and resources, but that is discussed elsewhere in this chapter (section (f) below).

Also, that if commissioners resolved to hear a certain number of cases each year, in most ICs the pendency could be tackled by eleven or less commissioners. The CIC had set an annual norm for itself of 3200 cases per commissioner, per year. This was considered reasonable. Adopting such a norm would mean that each commission, if it was fully staffed, could dispose 35,200 cases a year. This is more than the number of cases received by most commissions. Only the CIC and the state ICs of Maharashtra and Uttar Pradesh received more than 35,200 cases per year (for details of cases received by commissions, see table IV, chapter 5, of this report).

iii) Transparency in the appointment process: There has been a long standing public demand to make the process of appointing information commissioners as transparent as possible. This has partly been a result of the inexplicable selections made in many of the information commissions, where people with little merit, and sometimes with specific demerits, were appointed. But this demand is also in keeping with the spirit of the RTI Act and of the transparency regime. After all, if the appointment of information commissioners is

itself clouded in secrecy, then how can one expect transparency in the process of other appointments, leave alone in other matters.

The Supreme Court, in **SC Union of India vs Namit Sharma 2013**, laid down the beginnings of a transparent process, and also directed that the qualifications and experience of selected candidates must be made public:

"39.5. We further direct that the Committees under Secs. 12(3) and 15 (3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made."

This was the bare minimum requirements for transparent selection, but even this was not followed by many states. At least in one case, this was brought up before the Gujarat High Court which, in **HC-GUJ Jagte Raho 2015**, set aside the appointment of information commissioners because the government had not followed the directions of the SC.

The Central Government, for the last few years, has been advertising the posts of information commissioners and the Chief Information Commissioner, and has been putting in the public domain the names of all the applicants and a brief description of all the short-listed applicants. However, they give no detailed or convincing reasons on why those appointed were selected over the others, who applied. Meanwhile retiring or retired civil servants continue to heavily dominate all new appointments.

Clearly what is required is not just greater transparency but also greater accountability, where the government must give detailed and credible reasons why each one of those appointed was preferred over all the others. Equally important, the commissions must maintain a balance and not let any one profession or service dominate the commissions.

b) Powers of the information commission to enforce provisions of the RTI Act

The ICs have various powers provided to them by the RTI Act. These include the power to initiate an enquiry on any matter brought before it in a complaint [S. 18(2)], some of the powers of a civil court while inquiring into any matter [S. 18(3)], and the power to examine, as part of an enquiry, any record to which the RTI Act applies [S. 18(4)].

Under section 19(7) the decision of the commission on an appeal against an order of the PIO or FAA is reiterated to be final, and in section 19(8) the IC has the powers to “require” the PA “to take any such steps as may be necessary to secure compliance with the provisions of this Act...”. It also has the power to award compensation to a complainant and to impose “any of the penalties provided under this Act”.

Section 20(1) empowers the IC to impose penalties in response to both appeals and complaints. This is perhaps the most potent of the powers given to the ICs and is discussed in detail in chapter 28. Section 20(2) empowers the IC to recommend disciplinary action against a PIO for “persistent” violation of one or more provision of the Act.

Section 19(8) has been progressively interpreted by the Supreme Court in **SC CBSE 2011**. Therein it specifies that the power given to the ICs under this clause is a general power and can be applied to matters other than just those listed in clause (a) of 19(8):

“ 36...Section 19(8) of RTI Act has entrusted the Central/ State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of section 19(8) refers to six specific powers, to implement the provision of the Act...The power under section 19(8) of the Act is intended to be used by the Commissions to ensure compliance with the Act...”

i) Where IC orders are disregarded by PIOs: Despite all this, many information commissioners express a sense of powerlessness. They maintain that though they have powers to impose penalties on PIOs, they have no further powers to ensure that the penalties so imposed are actually recovered from the PIO. They also do not have any powers to ensure that their directions and orders are obeyed. For example, once they have directed that the asked for information be provided to the applicant in a time bound manner, they do not have the power to ensure that the information is actually provided to the applicant, and within the time frame given.

This is a problematic issue, for in many cases PIOs disregard specific orders of the ICs, and the applicants are left to fend for themselves. Commissioners seem to believe that there is no provision in the RTI Act that can directly be invoked to ensure that their orders are complied with. Commissioners also claim that they are not empowered to penalise errant PIOs who disregard their orders, once final orders in a matter have been passed.

Some ICs have adopted innovative strategies, like “*continuing mandamus*”, by which they keep a case open till their “interim” orders have been fully complied with. This leaves open the possibility of imposing a penalty, or an enhanced penalty, on the PIO, or awarding compensation to the applicant, at the cost of the PA. Alternatively, appellants or complainants have to again approach the IC in a fresh complaint, if the ICs orders are not complied with by the PIO, and then await their turn for a hearing. This can take months, or even years, depending on the commission. And yet there is no guarantee that the PIO would comply with the second set of orders any more than he or she did with the previous ones.

Unfortunately, as discussed later in this chapter, the ICs seem to have not fully understood or exercised the powers available to them under the RTI Act and under various other laws. This seeming hesitation on their part has also resulted in a general perception among the public that ICs do not effectively use the powers they have, to ensure compliance with the letter and spirit of the RTI Act.

ii) Where IC orders are disregarded by public authorities/officials: Though section 20(1) of the RTI Act does lay down that the IC can penalise a PIO if the PIO obstructs “*in any manner in furnishing the information*”, there is no such provision in the RTI Act for penalising other officials or the public authority, if they obstruct in the furnishing of information, for example by not proactively displaying the legally required information, and for other violations of the RTI Act not directly involving the furnishing of information, like not refunding the fee or costs illegally collected.

On the face of it, it is surprising that having given the commission such a huge mandate and wide ranging powers under these various sections of the RTI Act, especially section 19(8), the RTI Act does not correspondingly give the commissions power to ensure that its directions and orders are followed. But of significance here are various Supreme Court orders, especially ***SC Sakiri Vasu 2007***, which hold that it is once a statute gives a power to an authority to do something, then it includes the implied power to use all reasonable means to achieve that objective:

“18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his 'Statutory Construction' (3rd edn. page 267):

If these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission.

20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein.

21. An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Thus in *ITO, Cannanore v. M.K. Mohammad Kunbi* AIR 1969 SC 430, this Court held that the income tax appellate tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

22. Similar examples where this Court has affirmed the doctrine of implied powers are *Union of India v. Paras Laminates* MANU/SC/0173/1991 MANU/SC/0173/1991 : [1990]186ITR722(SC), *Reserve Bank of India v. Peerless General Finance and Investment Company Ltd.* MANU/SC/0165/1996 MANU/SC/0165/1996 : [1996]1SCR58, *Chief Executive Officer and Vice Chairman Gujarat Maritime Board v. Haji Daud Haji Harun Abu* MANU/SC/1719/1996 MANU/SC/1719/1996 : (1996)11SCC23, *J.K. Synthetics Ltd. v. Collector of Central Excise* MANU/SC/0972/1996 MANU/SC/0972/1996 : 1996 (86) ELT472(SC), *State of Karnataka v. Vishwabharati House Building Co-op Society* MANU/SC/0033/2003 MANU/SC/0033/2003 : [2003] 1SCR 397 etc.”

By implication, this would mean that there is no legal reason why the IC cannot impose a penalty on other liable persons, say the HoD of the PA or whoever else is responsible, for not complying with its lawful orders and directions, and for violating the RTI Act. As the IC is empowered by the RTI Act to impose penalties explicitly on PIOs, it can also impose it on whoever else might be in violation of the RTI Act, by using its “implied powers”.

There still remains one hurdle, as even the IC orders imposing penalty on the PIO or on others, or granting compensation to the appellant or applicant, have finally to be implemented by the concerned public authority. A non-cooperative PA can disregard the IC orders without any remedy within the RTI Act.

Fortunately, remedies seem to be available under other applicable laws. For example, where the PA refuses to recover the penalty imposed by the IC, the head of the PA can be cited under section 217 of the IPC which says:

“217. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture —

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

Further, where other lawful directions of the IC have been disregarded by a public authority, recourse can be taken to section 187 or 188 of the IPC which state:

“187. Omission to assist public servant when bound by law to give assistance —

Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.”

“188. Disobedience to order duly promulgated by public servant —

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation — *It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.”*

Also section 166 of the IPC can be invoked, which says:

“166. Public servant disobeying law, with intent to cause injury to any person —

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”

iii) *Status of IC orders where high court is moved in the matter:* PAs and PIOs are also prone to ignoring IC orders if they have, or intend to, file a writ with the high court. This is even when no stay order has been given by the HC. This often happens, despite the IC specifying in its order a time frame within which the order must be complied with. However, at least two high court orders reiterate that unless a stay is given by the court, a lawful order remains operative.

In **HC-RAJ RPSC 2012** the Rajasthan High Court has explicitly held that in the absence of a specific stay, the orders of the IC remain operative.

“4. It is relevant to record that petitioner (PSC) filed instant writ petition on 02/12/2008 after lapse of four months and there was no interim protection granted by the court, and four years having rolled by after passing of order dated 13/06/2008 still in compliance thereof, the desired informations was not furnished to the respondent-1. It was not expected from the constitutional functionary like petitioner (PSC) to sit over the matter despite the directions to be complied within 21 days while the writ petition was filed after four months and mere filing of the writ petition will not absolve the public authority (PSC) from disobeying orders of RTI authority, unless interim protection being granted by the court.” (Emphasis added).

In **HC-DEL State Bank of India 2013** the HC applies this general principle to matters that might have been moved in the SC, and holds that till a stay or a modified order emerges, they are bound by the existing orders.

“3. XXX

“The learned counsel also points out that the whole issue related to disclosure of the ACR has now been referred to a Larger Bench of the Supreme Court by virtue of an order dated 29.03.2012 passed in SLP(C) No. 15770 of 2009 which now stands converted into Civil Appeal No. 2872 of 2010 and, therefore the Court should await for the decision of the Larger Bench of the Supreme Court. He also says that the issue has also been raised by the petitioner-bank in SLP(C) No. 5296 of 2009 and the said SLP has been admitted on 06.07.2012.

4. So long as the view taken by Supreme Court in Sukhdev Singh (supra), which is a judgment by a Three Judges Bench of the Apex Court is not modified by the Apex Court, this Court is required to follow the ratio laid down in the aforesaid decision and consequently, cannot refuse disclosure of the Annual Confidential Report/ Appraisal Report to the public servant concerned, irrespective of whether the disclosure is sought under RTI Act or otherwise directly from the employer.”

In such cases, given the stand of the judiciary, recourse can be taken to the earlier mentioned sections of the IPC.

iv) Recommending disciplinary action

Section 20(2) of the RTI Act also empowers the ICs to recommend disciplinary action against PIOs who persistently violated the law. The SC has clarified the legal position by stating:

“30. All the attributable defaults of a Central or State Public Information Officer have to be without any reasonable cause and persistently. In other words, besides finding that any of the stated defaults have been committed by such officer, the Commission has to further record its opinion that such default in relation to receiving of an application or not furnishing the information within the specified time was committed persistently and without a reasonable cause. (SC Manohar 2012).

The SC goes on to state that:

“We would hasten to add here that wherever reasonable cause is not shown to the satisfaction of the Commission and the Commission is of the opinion that there is default in terms of the Section it must send the recommendation for disciplinary action in accordance with law to the concerned authority. In such circumstances, it will have no choice but to send recommendatory report. The burden of forming an opinion in accordance with the provisions of Section 20(2) and principles of natural justice lies upon the Commission.” (Paragraph 30, SC Manohar 2012)

However, to be in conformity with section 20(2), as interpreted and clarified by the SC, all the ICs must maintain a database of the PIOs brought before them so that they can assess which of them is a persistent offender, and this information must be available to each commissioner every time they hear an appeal or complaint. This does not appear to be happening at the moment.

c) Powers relating to the management of records

Among the various specific powers of ICs listed in section 19(8)(a), a critical one relates to the power of the IC to require PAs to make the necessary changes *“to its practices in relation to the maintenance, management and destruction of records”*. For successful implementation of the RTI Act, the proper classification, storage and management of records is crucial. This is especially so because a new emerging threat to the RTI regime is the tendency of PAs to either destroy information quickly, or at least claim to have destroyed it, or store and manage it in such a way that it becomes easy for them to take a plea, under section 7(9), that the retrieval of the asked for information would *“disproportionately divert”* their resources. Even though denial of information under 7(9) is not permitted (see chapter 13 for a detailed discussion), this is either ignored or applicants are invited to come and search for the information themselves.

Apart from section 19(8)(iv), of relevance is also section 4(1), which lays down that:

“4. (1) Every public authority shall—

a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised...”

Given the fact that the IC, under section 19(8), has the power to *“require”* the PA to do all that is required to secure compliance with the provisions of this Act, it also has the power to require that 4(1)(a) is properly implemented and that the procedures of maintaining, managing, and destroying records are such that they facilitate, rather than inhibit, access to information.

Unfortunately, in reality ICs are, by and large, neither using their powers under this section to review and rectify the practice and procedure of PAs managing and destroying records, nor are they even checking, when specific requests are denied because records have been destroyed, and whether this destruction was in keeping with the rules and policies of the PA. Some typical orders are described below.

In one case, the CIC upheld the denial of information by the Eastern Central Railway on the grounds that the information sought was 11 years old. In its order the CIC held:

“5. The respondent stated that because 11 years have passed, hence the information is not available and due to non availability of information they are unable to provide any information in context of the RTI application.

6. The response of the respondent is in conformity with the RTI Act. No further action is required at the level of the Commission.” (CIC/003412 dated 26.02.2014)

There appears to have been no effort made by the IC to determine whether the asked for information was required under prevailing rules and practices to be retained for eleven years, and if not, did the prevailing rules and practices need to be modified at least for the future.

In another case, without making any apparent effort to check the record retention schedule of the public authority, the IC upheld the contention of the PIO that information that was 10 years old could not be provided:

“It is brought on record that the CPIO states that the information held by them has already been furnished to the appellant and part information which is more than 10 years old cannot be traced / is not held on record and therefore cannot be provided (CIC/001760 dated 11.04.2013)

In case the information sought was such that as per prevailing rules and practices it ought to have been preserved for more than ten years, then the IC should have directed the PA to conduct an enquiry to trace the record, and if still not found, the IC should have directed the PA to recreate the record and fix accountability for why it was not traceable (see section d) below for a discussion on missing records). If the information was not held on record because it had been destroyed, the IC should have verified the period for which the record was required to be maintained and if it had been destroyed in violation of the applicable retention policy, the IC should have initiated appropriate action under section 20 of the RTI Act.

In a similar case, information denial was upheld by the CIC through an order stating, *“CPIO responded that the information sought by the appellant was 31 years old and no record was available... Respondent has acted in conformity with the RTI Act.” (CIC/ 003045 dated 17.02.2014)*

The Bihar Information Commission, in its order, upheld information denial by simply stating, *“Information sought is 17 years old and cannot be found...Available information has been provided. Matter closed”*. (translated from Hindi) **(SIC/BIH/51376 dated 02.07.2013)**. A similar denial from the Assam SIC is described in chapter 21(c) **(SIC/ASS/KP(M).35/2013)**.

d) Powers relating to missing records

RTI applicants are often faced with the response from PIOs, that the asked for information is not traceable or that the required record has been misplaced, all polite terms for “lost”. Various information commissions respond to this in various ways, some expressing helplessness, others directing that a proper search be undertaken, others requiring the missing records be re-constructed, and in some cases there is even a demand for filing a first information report with the police. In one case, in the early days of the RTI Act, a whole cupboard full of files was claimed to have gone missing till the concerned commissioner directed that an FIR should immediately be filed. Subsequent to these directions, the files were quickly found.

As government records are government (and public) property, obviously their loss must be taken seriously by the ICs, and responsibility must be fixed both on those who were negligent in allowing them to go missing and others, who hid, stole, or destroyed them. Unfortunately, this is not a practice that is yet widely practised. Therefore, it is heartening to see that at least four high court orders took a serious note of “misplacing” records.

In ***HC-DEL Parmod Kumar Gupta 2013*** the Delhi High Court specified that the procedure to be adopted if a record or file was lost or misplaced. It directed the PA to reconstruct the missing file in a time bound manner and to give on affidavit the names and details of all the officers that had dealt with the file.

“7. Having heard the learned counsels for the parties and perused the stand taken on affidavits, it is quite evident that BSNL has stuck to its stand that the aforementioned file is not traceable. I had put to Mr. Agrawala as to whether any attempt was made to reconstruct the file. Mr. Agrawala says that he has no instructions in that behalf.

8. On the issue, as to fixation of responsibility of officers who dealt with the file, I had specifically put to Mr. Agrawala as to whether BSNL still adhered to its stand that the file went missing, as indicated in their affidavit, on 20.02.2011. Mr. Agrawala says that BSNL adheres to this stand. Therefore, in these circumstances, BSNL is directed to produce before this court the reconstructed file. In case the file is not reconstructed; before the next date of hearing the file will be reconstructed and produced in court. Since, according to BSNL, the file went missing on 20.02.2007, an affidavit will be filed naming all the officers who would have in the ordinary course of their duties dealt with the file and, their present status, in BSNL, that is, whether they have retired or are still in service. Let the needful be done within three weeks.”

In **HC-DEL Union of India Vs. Vishwas Bhamburkar 2013**, the Delhi High court reiterated that personal responsibility must be fixed for losing a file. The HC went on to say that a proper search must be made and that the IC can either direct an enquiry to be conducted, or have an enquiry conducted, when either a file is lost or the PA maintains that the asked for information was never in its possession. The HC warned that unless all this is done, there would be little to prevent vested interests from claiming that all sensitive information was lost, or was never in their possession.

6. This can hardly be disputed that if certain information is available with a public authority, that information must necessarily be shared with the applicant under the Act unless such information is exempted from disclosure under one or more provisions of the Act. It is not uncommon in the government departments to evade disclosure of the information taking the standard plea that the information sought by the applicant is not available. Ordinarily, the information which at some point of time or the other was available in the records of the government, should continue to be available with the concerned department unless it has been destroyed in accordance with the rules framed by that department for destruction of old record. Therefore, whenever an information is sought and it is not readily available, a thorough attempt needs to be made to search and locate the information wherever it may be available. It is only in a case where despite a thorough search and inquiry made by the responsible officer, it is concluded that the information sought by the applicant cannot be traced or was never available with the government or has been destroyed in accordance with the rules of the concerned department that the CPIO/PIO would be justified in expressing his inability to provide the desired information. Even in the case where it is found that the desired information though available in the record of the government at some point of time, cannot be traced despite best efforts made in this regard, the department concerned must necessarily fix the responsibility for the loss of the record and take appropriate departmental action against the officers/officials responsible for loss of the record. Unless such a course of action is adopted, it would be possible for any department/office, to deny the information which otherwise is not exempted from disclosure, wherever the said department/office finds it inconvenient to bring such information into public domain, and that in turn, would necessarily defeat the very objective behind enactment of the Right to Information Act.

7. Since the Commission has the power to direct disclosure of information provided, it is not exempted from such disclosure, it would also have the jurisdiction to direct an inquiry into the matter wherever it is claimed by the PIO/CPIO that the information sought by the applicant is not traceable/readily traceable/currently traceable. Even in a case where the PIO/CPIO takes a plea that the information sought by the applicant was never available with the government but, the Commission on the basis of the material available to it forms a prima facie opinion that the said information was in fact available with the government, it would be justified in directing an inquiry by a responsible officer of the department/office concerned, to again look into the matter rather deeply and verify whether such an information was actually available in the records of the government at some point of time or not. After all, it is quite possible that the required information may be located if a thorough search is made in which event, it could be possible to supply it to the applicant. Fear of disciplinary action, against the person responsible for loss of the information, will also work as a deterrence against the willful suppression of the information, by vested interests. It would also be open to the Commission, to make an inquiry itself instead of directing an inquiry by the department/office concerned. Whether in a particular case, an inquiry ought to be

made by the Commission or by the officer of the department/ office concerned is a matter to be decided by the Commission in the facts and circumstances of each such case.”

XXX

“The petitioners are directed to circulate a copy of this order to all the CPIOs/PIOs of the Government of India and other Public Authorities, within four weeks for information and guidance.”

In ***HC-HP Ved Prakash 2013***, the Himachal Pradesh High Court held that the plea that the asked for information cannot be supplied, because the relevant records have been misplaced or destroyed, should not be accepted by appellate bodies. The HC warned that otherwise in every case the public authority would take such a plea and this would defeat the whole purpose of the RTI Act.

“10...It was the duty cast upon respondent No. 2 that the correct information is supplied to the petitioner. Respondent No. 2 instead of adjudicating the matter strictly as per the Act, has supplied the petitioner with Annexure P-8, dated 13.07.2010, whereby the Pradban has sent the communication to the Block Development Officer on 13.07.2010, stating therein that though he has received the documents, but these were not entered in the records of the Gram Panchayat and he has mis-placed the same. This plea ought not to have been accepted by the second respondent lightly. In case these kinds of pleas are accepted, then in every case, the concerned authorities would take a plea that the record is destroyed and the information was not available. This will go against the very spirit of the Act...”

In fact, in ***HC-BOM Vivek Anupam Kulkarni 2015*** the Bombay High Court upheld the order of the Maharashtra IC that criminal action be initiated against officers responsible for loss of a file relating to release of various lands in and around the vicinity of Sangli city, which were acquired by the government under the Urban Land (Ceiling and Regulation) Act, 1976. The HC stressed that such a loss constitutes a violation of the provisions of the Maharashtra Public Records Act, and attracts a fine or a term of imprisonment of up to five years. The court awarded costs of ₹ 15,000 to the petitioner and observed:

“3. The case in hand is a classic example, as to how the Government officers for protecting their fellow officers tend to frustrate the basic intention of the legislature behind the enactment of the Right to Information Act, 2005.”

Despite these progressive judicial orders, it is not uncommon for ICs to uphold denial of information because relevant files containing the information sought are not traceable. Some of the typical orders are summarized below:

In a 2013 order, the CIC ruled:

“2. In the RTI application dated 30.11.2012, the appellant had sought copies of the claims of HP Auto Centre, Gadarnada, passed by the company. Shri Choudhury submits that copies of claims for the year 2008 have since been provided to the appellant but the rest of the records are not traceable due to their misplacement. In view of the above, the matter is being closed.” (CIC/001061 dated 24.07.2013)

In another appeal relating to the Ministry of Urban Development, the CIC stated:

“...the appellant was seeking information regarding the floor wise ownership of a property, guidelines to allow additional construction, whether the guidelines are legally vetted, etc. Respondent stated that there was a file for that particular property with the Ministry but the file was not traceable...No action is required to be taken in the matter.” (CIC/000357 dated 31.12.2013)

The practice of ICs agreeing with the PIO in such cases, without any repercussions on the PIO, could potentially defeat the purpose of the Act, as PIOs would feel encouraged to deny information on the pretext that files have gone missing or can't be traced.

e) Power to institute an enquiry

Another significant power given to the ICs under section 19(8)(a), read with the powers given in section 18(2), (3), & (4), relates to the conduct of an enquiry. Section 18 gives powers to the IC to conduct an

enquiry, while section 19 gives the IC powers to require a public authority to conduct an enquiry, among other things.

Section 18 also gives the ability to the IC to unravel complicated cases of denial of information or other violations of law by summoning the concerned persons and recording evidence under oath, receiving evidence on affidavit, requiring discovery and inspection of documents, etc.

The Delhi High Court has held that the general power given to the IC under section 19(8)(a) empowers the commission to order an enquiry and, indeed, to take all other steps that it might consider necessary to secure compliance with the provisions of the RTI Act.

“5. The learned counsel for the petitioner assailed the order of the Commission primarily on the ground that the Right to Information Act does not authorize the Commission to direct an inquiry of this nature by the department concern, though the Commission itself can make such an inquiry as it deems appropriate. Reference in this regard is made to the provisions contained in Section 19(8) of the Act. A careful perusal of sub section (8) of Section 19 would show that the Commission has the power to require the public authority to take any such steps as may be necessary to secure compliance with the provisions of the Act. Such steps could include the steps specified in clause (i) to (iv) but the sub-section does not exclude any other step which the Commission may deem necessary to secure compliance with the provisions of the Act. In other words, the steps enumerated in clause (i) to (iv) are inclusive and not exhaustive of the powers of the Commission in this regard.” (HC-DEL Union of India vs. Vishwas Bhamburkar 2013)

The Delhi High court has, through this order, clarified that Information commissions can, under section 19(8)(a) “take any such steps as may be necessary to secure compliance with the provisions of the Act.” The HC has further clarified that “the steps enumerated in clause (i) to (iv) are inclusive and not exhaustive of the powers of the Commission in this regard.”

f) Functioning of information commissions

Apart from the non-imposition of penalties (discussed in chapter 28), perhaps the most vexatious aspect of the functioning of many information commissions in India are the huge delays before appeals and complaints are taken up and acted upon. The various RaaG surveys have documented the delays in various commissions over the years (for details, see chapter 5, table VII). Part of the problem lies with the vacancies in the information commission (discussed above in section a(ii)), but part of the problem is also because of the manner in which information commissions function (discussed in chapter 5).

There also needs to be a review of the structure and processes of ICs. Even though a large majority of cases are essentially procedural, requiring no adjudication at least at the initial stages, as things stand they all come before information commissioners, thereby unnecessarily taking up their time and also causing huge delays in disposal. In other commissions, like the Information Commissioner’s Office (ICO) in the UK, the matters received by the ICO are assessed by senior functionaries in terms of the expertise required for handling them. They are then allocated to professional staff, with the least experienced getting the simplest ones, and so on. The “case officers” who are allocated these cases have a maximum of 30 days to initiate action on each case, and the progress is monitored initially by mentors (from among lead and senior case officers), and where necessary by team managers. Only in rare cases is the matter escalated, at least at the initial stages, to senior levels.

There is a separate enforcement wing so that when a matter has been adjudicated upon and a decision has been taken by the professional case officers, and ratified at the appropriate level, the case is also referred to the enforcement wing that determines the legal possibilities of imposing a penalty. Another wing liaises with the government and their agencies to advise them on making their policy and practice in consonance with the Freedom of Information Act and the Data Protection Act, which come under the jurisdiction of the ICO (for details see box 15 below).

In the Indian system, the functioning of the commissions could be significantly improved if a professional cadre of legally trained “case officers” were given the initial handling of appeals requiring just a notice to be sent or a clarification to be sought, and a large proportion are of this type. Only when there are serious issues for adjudication, like whether the PIO has acceptable reasons for denying some or all of the asked for information, should the matter be put up for the consideration of the commissioner. Where the commissioner determines that the denial was not justified, then orders for disclosure need to be issued under the signature of the commissioner.

BOX 15

Processes followed in UK Information Commissioner’s Office, Wimslow

In other commissions like the Information Commissioner’s Office (ICO) in the UK, all complaints made to the ICO are dealt with by case officers at various levels of seniority. Case officers are organised into groups that deal with specific authorities and incoming complaints are assigned to relevant groups. Once assigned to the work queue of a specific group, a manager will sort through the complaints and assign them to individual case officers based on seniority – more complex cases are assigned to senior and lead case officers.

A case officer must begin work on each complaint within 30 days of the complaint being received by the ICO. In some cases the case officer will be able to make a decision immediately, and be able to provide this to the complainant. However, in many cases, the initial contact will either ask the complainant for further information to support their complaint, or will inform them that the ICO will now write to the organisation concerned in order to obtain further information before making a decision on the case. The ICO aims to conclude 90% of its cases within six months, and has committed that no cases will take longer than twelve months for an outcome.

The ICO has also taken the step to appoint senior managers as ‘signatories’ who have the authority to sign off on the ICO’s legally binding decisions. This has allowed the ICO to be much more efficient in issuing decision notices and managing its volume of complaints.

The ICO also has a separate Enforcement department, which is charged with assessing whether enforcement action needs to be taken in relation to a breach of the Data Protection Act 1998 (the DPA) by any organisation. Enforcement can choose to take action independently, if it becomes aware of a breach of the DPA, or matters can be referred to them through the complaints wing of the ICO. The ICO also has a system where organisations can self-report a breach to the ICO. Enforcement action generally takes the form of a fine, currently a maximum of £500,000.

Other action that can be taken by Enforcement includes the issuing of ‘information notices’ which can compel organisations to provide the ICO with information relating to the investigation of a complaint.

The Commissioner focuses a great deal on high level policy initiatives, in which she is supported by policy departments within the ICO. These departments focus on developing relationships with stakeholders across a broad spectrum, as the in the UK the DPA applies to both public authorities and private bodies. The ICO engages actively with these stakeholders to ensure that new laws, policies and initiatives are compliant with the legislations it regulates. Organisations will also independently approach the ICO for input on proposed initiatives, to ensure that they avoid possible enforcement action in the future.

In a significant proportion of the cases before at least the state ICs, the PIO provided the asked for information to the applicant even before the IC hearing took place or, at best, at the IC hearing. The analysis done for this study of a sample of Bihar state IC cases, it was found that in 67% of the cases that were heard, information had already been provided by the time the hearing took place. In 3% the information was handed over during the hearing! Where this happens, and is onfirmed, the matter need not take up the time of the commissioner except for the imposition of a penalty.

All cases, once they are adjudicated upon or otherwise resolved, must then be referred to an enforcement cell of legally trained professionals who need to determine whether in the handling of that specific request for information the PIO prima facie violated any provisions of the RTI Act (like causing delay, illegitimate refusal, non-response, etc.) and where they find that there has been such a violation, a show cause notice must be issued by the enforcement cell, giving the PIO an opportunity to put forward any justification that might exist for the legal violation. Any justification so received in response from the PIO should again be put up before a commissioner, perhaps an exclusive bench just dealing with penalties preferably manned by legally trained commissioners, and they should consider the justification given and

then either, on the basis of the justification, exonerate the PIO or impose the penalty prescribed under the law.

Where the PIO does not respond, the matter should again be put up to the aforementioned bench for the mandatory imposition of penalty.

g) Agenda for action

- i. One of the major thrusts of this report has also been the numerous legal errors, some even institutionalized, in the vast proportion of IC orders. As these are partly because of a lack of jurisprudential orientation and partly because of inadequate public scrutiny of the type that this study is attempting to do, it is recommended that there be mandatory orientation workshops for information commissioners when they join the commission, and then periodically, to initially familiarize them with the law, with important precedents, especially the binding ones, and with the principles of responsible jurisprudence. Subsequent workshops should be aimed at keeping them updated on the evolving body of case law and public debate regarding the RTI Act.
- ii. Information commissions need to be better balanced bodies having a mix of former civil servants, legal professionals, social activists, academics, journalists and other professionals. Even if decisions are taken by individual commissioners, there should be adequate opportunities to discuss cases with each other, and to informally consult one another, so that the final orders are a manifestation of all the experience and expertise that a commission, with a varied membership, would be privy to.
- iii. Perhaps arbitrarily limiting the size of the information commission to eleven is not the best way to ensure its efficacy. Given the huge and growing delays in some commissions, what is required is to determine the size of the commission based on a realistic assessment of how many cases a commissioner can clear in a month, and how many cases are likely to be received in a month. This would ensure that cases are not pending for more than thirty to forty five days, which should be the maximum period for pendency.
- iv. Clearly what is required is not just greater transparency but also greater accountability, where the government must give detailed and credible reasons why each one of those appointed as a commissioner was preferred over all the other candidates.
- v. Academic, research and professional institutes, and civil society groups, must take on the task of periodically reviewing the performance of information commissions, especially the quality of their orders, and raise publicly relevant issues both involving criticism of the commissions and support for them, where that is required.
- vi. There also needs to be a review of the structure and processes of ICs. Perhaps learning from other ICs, like the ICO of UK. In order to reduce pendency and waiting time, the structure needs to be infused with a trained cadre of officers to facilitate the processing of appeals and complaints.
- vii. At the initial stage, each case should be handled by a case officer who, after examining the case, should within 15 days seek the response of the PIO on the specific issues that need to be adjudicated in the appeal or complaint.
- viii. Cases where the asked for information has been provided without the need for adjudication, and this has either been confirmed by the applicant or documentary evidence brought on record, the case officer must forward the file to the enforcement section.
- ix. Where all the asked for information has not been provided, or there is a dispute about what information can be provided, or where the applicant is not satisfied, the case officer must put up the matter for adjudication to the concerned information commissioner.

- x. In all cases, where the appeal or complaint has been resolved without adjudication, or where adjudication was required, and whatever the outcome of the adjudication, the appeal or complaint must then be passed on to the enforcement section, whose job would be to make a preliminary assessment on whether penalty should be imposed or disciplinary action recommended, against the PIO.
- xi. In all cases where a penalizable violation of the law has occurred, the enforcement section must immediately issue a show cause notice to the concerned PIO and then put up the case, along with the PIOs response, if any, to either the commissioner who originally dealt with the matter, or to a commissioner especially delegated the function of dealing with penalties and related issues. As per the RTI Act, the onus of proving that no penalty is imposable would solely be of the PIO.
- xii. Such a system would streamline the process, as the first communication from the IC would be within 15 days of an appeal/complaint being filed with the IC. Also, the correspondence with the PIO prior to the hearing will make the hearing more efficient as the composite position in terms of the grounds for the appeal or complaint and the response of the PIO would already be on record.
- xiii. The ICs should exercise the vast powers provided to them under the RTI Act and use these to ensure that records are managed in a way that they facilitate access to information of the public. There is enough evidence now to determine, in terms of past RTI applications, what are the types of information that the public is interested in from each PA, and this evidence should be used to organise records in a way such that the type of information likely to be required becomes quickly accessible.
- xiv. Each IC must maintain a database of the PIOs brought before them so that they can assess which of them is a persistent offender, and this information must be available to each commissioner every time they hear an appeal or complaint.
- xv. The system of records management should also be designed to prevent PIOs and PAs from taking recourse to section 7(9) and arguing that the provision of the asked for information would disproportionately divert their resources. Wherever a certain number of applications are received by a PA for a certain type of information, the records must be so reorganised so as to be able to quickly service such requests.
- xvi. In matters where PIOs claim that records are missing, or inaccessible, or poorly classified, the powers of the ICs under S. 19(8)(a)(iv), along with the obligations of the PA specified in S. 4(1)(a), should be collectively used by ICs to ensure that:
 - Computerisation and networking of documents is being done appropriately and speedily.
 - That the classification, storage, management, and destruction of records and documents is being done by all PAs in order to facilitate access to information under the RTI Act.
 - Towards this end, the ICs need to have prepared a set of guidelines that should be the basis to judge levels of compliance by the PAs, and the PAs should be required to send in annual returns on their progress.
- xvii. The practice adopted by some ICs of keeping a case open till its interim orders are complied with, and only close the case after such compliance, should be commended to all ICs as it allows them to put pressure on the PIO till their directions and orders are obeyed. Where PAs are concerned, relevant provisions of the Indian Penal Code can be invoked by the ICs to ensure compliance by PAs with their lawful orders.
- xviii. Information commissioners must be made aware of the court orders and the legal provisions with relation to missing records. Besides, the public should also be made aware of their rights under such

circumstances, and central and state governments should include this information as a part of the information that is widely disseminated to raise awareness about the RTI Act.

- xix. Like the UK ICO, ICs should hold periodic meetings with relevant stakeholders, including members of the civil society and senior officials of PAs, to discuss how to improve the implementation of the RTI Act and the functioning of the PAs, keeping in view its obligations under the RTI Act.
- xx. It would also help if a standing advisory committee is set up with representatives of all major stakeholders as members, that meets at least twice a year to discuss the implementation of the RTI Act. The committee can be co-chaired by the Minister responsible for the RTI and the Chief Information Commissioner at the Centre, and in each state.

25. Complaints [S. 18(1)]

Section 18(1) of the RTI Act:

“18. (1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,—

(a) who has been unable to submit a request to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;

(b) who has been refused access to any information requested under this Act;

(c) who has not been given a response to a request for information or access to information within the time limit specified under this Act;

(d) who has been required to pay an amount of fee which he or she considers unreasonable; (e) who believes that he or she has been given incomplete, misleading or false information under this Act; and

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act. “

Major Issues

The Indian RTI Act, unlike many other transparency laws across the world, distinguishes between complaints and appeals. An appeal, filed under section 19(1), is basically aimed at activating the adjudicatory system of the first appellate authority and, if needed, the information commission, to ensure that all information that is not exempt should be provided to the applicant, and as soon as possible. Of course, where the law has been violated, a penalty is imposable even in an appeal process, and where appropriate compensation can also be awarded to an applicant, appellant, or complainant. In contrast, a complaint, filed under section 18(1) is aimed at ensuring that all violations of the RTI Act by the PIO are appropriately penalised. In addition, it provides a forum for redress if a PA has not put in the requisite machinery to service the RTI Act.

As these two objectives are distinct, appeals and complaints can technically run concurrently. Therefore, if applicants apply for some information and either do not get a response in thirty days (considered a deemed refusal), or get a part or full refusal after thirty days, a complaint can be filed with the IC, asking for the PIO to be penalised because of not responding at all, or for responding after the mandated thirty days. The beauty of this is that, suppose at the FAA level the issue of deemed or actual refusal of information is addressed and the information seeker is satisfied with the FAA's order, then even though the information was provided after the stipulated time, a second appeal cannot be filed as no grounds survive for a second appeal. But a complaint can still be filed against the initial delayed response, lack of response, or illegitimate refusal of a part or whole of the asked for information.

One advantage of the complaint mechanism is that it can directly address the information commission. In the appeal process, a first appeal has to be filed, against refusal or deemed refusal, with the first appellate authority. The FAA does not have powers to impose penalties. It is only if, and when, a second appeal is filed, with the information commission, that the appeal can also be looked at for violations and consequent penalties.

Another advantage is the absence of a time limit for filing a complaint with the IC. Therefore, a complaint can be filed whenever, and directly with the commission, against the violation of the RTI Act.

One consideration, during the drafting and discussion of the RTI bill, that was behind opting for these two distinct processes, was that whereas it was essential to have a time bound system for receiving information, violations of law became obvious sometimes much later. For example, it might be many months, or even years, before an applicant discovered that the information supplied was wrong, or misleading, or incomplete. The complaint process allows the applicant to seek redress for this, in the form of penalising the PIO, whenever the violation becomes apparent.

a) Accessing information through complaints rather than appeals

Over the years, many information commissions have been directing PIOs and PAs to provide information to complainants, where information has been wrongly denied, even though an appeal might not have been filed. In fact, the irony is that though complaints were intended to get the PIO penalised, they seem to have resulted more often in the provision of the asked for information than in the imposition of the asked for penalty. However, the SC ruled in 2011 that it was illegal to direct the provision of information in response to a complaint. Though the legal arguments supporting the SCs stand seem strong, there are also some unfortunate fall outs.

One fall out is that applicants will have to wait longer to get information, because the appellate process, which involves the filing of a first appeal, is very much more time consuming than a complaint process, where the applicant can approach the commission directly. The fact is that first appeals are rarely successful, with a success rate of less than 35% in Delhi, less than 20% in the Central Government, less than 10% in Assam and 0% in Bihar, Rajasthan and Andhra Pradesh, and a national average of 4% being recorded in the 2014 RaaG¹³⁴ study. This has encouraged applicants to deal directly with commissions and seek information.

Another problem is that as commissions have been widely ordering the provision of information in response to complaints, the general public has got used to this. It will take time and much heartbreak to re-educate the public that now they can no longer get information by filing complaints.

In *SC CIC Manipur 2011* the SC examined the issue of whether the information commission can order the provision of asked for information on the basis of a complaint filed under section 18 of the RTI Act. The issue here was that ordinarily the order to provide information was given on the basis of a second appeal filed under section 19, preceded by a first appeal within the concerned public authority, as specified in section 19. Section 18 was usually reserved to complain against various violations of the RTI Act and invoke, among other things, the imposition of penalty under section 20 of the RTI Act.

In this case the appellant, instead of filing an appeal, filed only a complaint with the Manipur Information Commission, under section 18 of the RTI Act. The Manipur Information Commission heard the complaint and directed the state government to provide the desired information to the applicant. However, the state government took the matter to the Manipur High Court and was successful in getting the order struck down by the High Court on the procedural ground that the information commission cannot direct that information be provided on the basis of a complaint under section 18, but only on the basis of a second appeal under section 19 of the RTI Act.

The matter finally came to the Supreme Court, which essentially upheld the order of the Manipur High Court:

“30. It has been contended before us by the respondent that under Section 18 of the Act the Central Information Commission or the State Information Commission has no power to provide access to the information which has been requested for by any person but which has been denied to him. The only order which can be passed by the Central

¹³⁴ P 73, chart 6n, chapter 6, RaaG & CES, 2014, *Op. cit.*

Information Commission or the State Information Commission, as the case may be, under Section 18 is an order of penalty provided under Section 20. However, before such order is passed the Commissioner must be satisfied that the conduct of the Information Officer was not bona fide.

31. We uphold the said contention and do not find any error in the impugned judgment of the High court whereby it has been held that the Commissioner while entertaining a complaint under Section 18 of the said Act has no jurisdiction to pass an order providing for access to the information”.

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“36. This Court accepts the argument of the appellant that any other construction would render the provision of Section 19(8) of the Act totally redundant. It is one of the well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage.”

Apart from contending, and rightly so, that if complaints were to be treated at par with appeals then the distinction between section 18 and 19 would disappear, and this was clearly not the intention of the legislature, the SC also pointed out various advantages of following the appeals process laid down in section 19:

“42. Apart from that the procedure under Section 19 of the Act, when compared to Section 18, has several safeguards for protecting the interest of the person who has been refused the information he has sought. Section 19(5), in this connection, may be referred to. Section 19(5) puts the onus to justify the denial of request on the information officer. Therefore, it is for the officer to justify the denial. There is no such safeguard in Section 18. Apart from that the procedure under Section 19 is a time bound one but no limit is prescribed under Section 18. So out of the two procedures, between Section 18 and Section 19, the one under Section 19 is more beneficial to a person who has been denied access to information.”

This order has become somewhat controversial, with many RTI users and well-wishers feeling that the SC did not give a purposive interpretation and thereby restricted access to information. Perhaps part of the reason for this reaction is that the practice of directing the release of information on the basis of complaints is quite widespread.

The logic of the SC cannot be faulted and there are overwhelming reasons to believe that the law intended section 18 and section 19 to play different roles. However, sadly, reasons behind this distinction have not stood the test of time.

It appears that there were at least three reasons why it was considered desirable to have a separate complaint and appeal path. First, it was thought that the institution of a time bound first appeal to a senior authority within the public authority would significantly hasten the process of access to information for the public and save them the hassle of having to approach a distant commission, located only at state or national capitals. Experience has shown¹³⁵ that very few first appeals (4%) resulted in information being speedily provided, and actually the requirement to file a first appeal and wait for the response, or wait at least till the deadline passed, has resulted in adding over two months to the process of appeals.

Second, it was thought that the possibility of filing a complaint with the information commission, under section 18, even while the first appeal was pending, would result in quick penalties being imposed on PIOs. This would discourage delays or mala fide refusals. Unfortunately, this has also not happened because commissions are very reluctant to impose penalties, even where there are clear cases of delay or illegitimate refusals, with penalties being imposed in less than 2% of the cases in which they were legally imposable. Besides, most commissions have such long delays that it is many months, sometimes years, before complaints come up for even initial consideration (for details of delays in ICs, see table VII in chapter 5 above).

¹³⁵ Section 6.3.2, page 72, chapter 6, RaaG & CES, 2014, *Op. cit.*

Third, it was envisaged in the initial version of the RTI bill, that there would be a time limit for disposal of both first appeal and second appeal. Sadly, there was a typo in the final bill and the time limit for disposal of second appeal got left out (see point 1 of letter in Box 16, at the end of the chapter).

Interestingly, the two advantages that the SC pointed out (*SC CIC Manipur 2011*, para 42, extracted above) to argue that appeals under section 19 better served the interests of applicants, rather than complaints under section 18, seem misplaced. As already mentioned, in terms of time, it takes much longer to use section 19, where there is a first appeal that has mostly proved to be ineffective, before you can get to the commission. And though it was originally intended, there is no time limit for second appeals. Therefore, it is much faster to go directly in a complaint.

Second, the SC's argues that section 19(5), available to appellants, puts the onus of justifying denial on the PIO, and that there is no similar provision available to complainants. However, perhaps it was not brought to the attention of the SC that section 20(1) provides a similar protection to complainants:

"Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint ... Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be."

Nevertheless, as things have turned out, the best way forward is for the applicant to adapt herself to the harsh realities of the RTI regime. What would be desirable in the long term is for all applicants to have the freedom to seek and hopefully get desperately needed information through filing complaints direct to the ICs. Someday, when the time is right, the RTI Act can be revamped accordingly.

Meanwhile, it can be hoped that once ICs are forbidden from ordering the provision of information in response to a complaint, they might start dealing with complaints as the law intended them to, and start imposing penalties!

b) Withdrawing petitions

There is no provision in the RTI Act which permits or even leaves open the possibility of appellants and complainants withdrawing their complaint and appeals. There is, therefore, no procedure laid down in the act or in the rules of how to deal with such an eventuality.

However, the Orissa High Court, in *HC-ORI Public Information Officer 2009*, held that the complainant had a right to withdraw a complaint and the IC could not have proceeded with the complaint, once it was withdrawn.

"2... The complainant did not appear but sent a better (sic) to the State Commission to permit him to withdraw the complaint. Even then, without permitting withdrawal of the complaint, the Commission came to hold that Petitioner No. 2 who was the dealing assistant & one Trilochan Pradhan who was the Section Officer were prima facie responsible for the delay..."

"3. Here at his stage we are not inclined to see the merits of the case in view of the provisions of the Right to Information Act & the Rules made thereunder, as it is not in dispute that the complainant did not want to proceed with the complaint & had already sought for withdrawal of his complaint. He also did not appear in the case. Even then the Orissa Information Commission kept the complaint pending & decided the same punishing the PIO."

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" 5. ... this power is to be exercised only at the time of deciding any complaint or appeal. But in this case since the complainant did not choose to appear & sought for withdrawal of the complaint, the complaint could not have been proceeded with. In view of the above, proceeding with the complaint in the absence of the complainant when he is not interested to proceed with the same is not warranted under the law & therefore, the Chief Information Commission has committed manifest error of law in proceeding with the complaint after condoning the absence when he had already sought for withdrawal." (Emphasis added)

Similar orders have also emanated from information commissions. An appeal had been filed to the CIC against the Delhi Police as the PIO had not furnished the requested information. The appellant was seeking information relating to the action taken report on his representation, dated 02.09.2013. The CIC dismissed the appeal as withdrawn after recording in its order that the appellant, vide letter dated 06.01.2016, had requested the Commission to permit him to withdraw his second appeal as the same had become infructuous due to passage of time.

From the order, it appears that the IC did not examine whether the requisite information had been provided in the interim, and also failed to examine whether any violations of the Act had occurred in terms of violation of the stipulated timeframe. (*CIC/000793/dated 18.01.2016*)

In another order, relating to the Syndicate Bank, the CIC held that the “the two appeals are dismissed as withdrawn”. The appellant had sought information regarding the action taken on a loan application, and related issues. The PIO informed the IC that in the interim a loan had been awarded to the applicant’s wife and the IC noted that vide two letters, addressed by the Appellant to the Commission, the appellant wished to withdraw his appeals as the bank had addressed his grievance. (*CIC/000367 & CIC/001265 dated 11.04.2016*).

Whereas the appellant’s original grievance, being the reason for seeking the information, may have been addressed, that does not affect the legal obligation of the commission to adjudicate on the matter and examine whether any violations of the RTI Act took place.

The SIC of Assam closed a case, as the appellant submitted that he would like to withdraw the appeal. However, from the facts recorded in the order, it appears that even at the time of the hearing at the SIC, the requisite information had not been furnished: “*It has been submitted that on account of paucity of time after receiving the Commission’s notices and staff strike in the office, a W/S (written submission) containing the requisite information could not be prepared before the date of hearing. Further, the SPIO has requested for refixing the date of hearing.*”

Instead of examining the matter, especially in terms of determining whether any penalizable violations occurred, the IC simply dismissed the matter. (*SIC/ASS/NGN.54 dated 22.01.2016*).

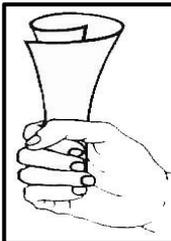
Such orders seem to have many serious implications. Most important, they open the door for appellants and complainants to be threatened or bribed, and also for them to threaten and extort. Besides, they seem to reduce a violation of provisions of the RTI Act, which is in essence a refusal to honour a fundamental constitutional right, to a minor crime against a person with the option for that person to withdraw the complaint. Surely the refusal of a fundamental right cannot be so lightly treated.

c) Agenda for action

- i. Given the ban, reiterated by the SC, on providing information in response to a complaint, it would be advisable for ICs to send all complainants a communication, as soon as a complaint is received, reminding them that as per Supreme Court orders, provision of information cannot be ordered in response to a complaint. Therefore, if they are interested in getting information, they should also file a first appeal, or a second appeal if they have not succeeded in their first appeal.
- ii. Similarly, the DoPT and state nodal departments for the RTI Act should issue directions to all PIOs to include, in their responses to applicants, the statement that if they want to contest the order relating to the provision of information, they must file an appeal under section 19, and if they are solely or additionally interested in the imposition of penalty and the resultant remedial steps, then they should file a complaint under section 18 of the RTI Act.
- iii. Also, given the general failure of the first appellate system, the Parliament might consider either making first appellate authorities also liable to be penalised, or get rid of the necessity to file a first appeal before the commission can be approached. This would hasten the appellate process and help

- in preserving the distinction between appeals and complaints, as then there would be no great advantage in filing a complaint, where an appeal was more appropriate.
- iv. As seemed to be the original intent, a time limit should be prescribed for the disposal of second appeals and complaints and, as earlier recommended, the strength of information commissions should not be fixed, as it is at present, but should be determined on the basis of the workload, the need to dispose of appeals and complaints within, say, 30 to 45 days, and a realistic norm of how many appeals and complaints a commissioner can dispose in a month.
 - v. Complaints should directly be referred to the enforcement cell of the ICs (recommended earlier) and a show cause notice invariably issued to the PIO or PA, as appropriate. Given that the onus of proof, as per section 20(1), is on the PIO, any justification offered by the PIO should be considered by commissioners of the enforcement bench of the IC (also recommended earlier) and either the PIO exonerated, based on the explanation offered, or the mandatory penalty imposed.
 - vi. The withdrawal of complaints and appeals should not be allowed, or at best left to the discretion of the information commission, which could decide whether the grounds for withdrawal were legitimate and justifiable, for example, where a complaint or appeal was filed on a basis that turned out to be erroneous.

BOX 16: NCPRI Letter



सूचना के जन अधिकार का राष्ट्रीय अभियान

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28 July 2005

Dear Shri Pachauri,

While congratulating you for skilfully steering the Right to Information Act through Parliament, we would like to bring to your notice two very significant errors that seem to have crept in to the act, as passed by the Parliament. As these errors would impact seriously on the proper implementation of the Act, we would urge you to rectify these errors by using the provisions of section 30(1), before the full act becomes operative in the middle of October 2005. The errors are described below.

1. In the RTI Act, section 19(6) reads as follows:

"An appeal under sub-section (1) or sub-section (2) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing."

Whereas the reference to sub-section (1) seems correct, the reference to sub-section (2) seems incorrect. Instead of sub-section (2) it should read sub-section (3).

This is borne out by the fact that in the RTI Act sub-section (2) of section 19 is not a section under which an appeal is preferred. The two sub-sections under which appeals are preferred are sub section (1) – to "an officer senior in rank..", and under sub-section (3) – to the Central or State Information Commissions.

This is also borne out by the fact that in the RTI Bill, as introduced in Parliament in December 2004, subsection (6) of section 16 (corresponding to section 19 in the amended bill finally passed) also mentions sub-section (1) and (2). However, in the December bill the provision for preferring an appeal before the information commission is in sub-section (2). This clearly indicates that the intention of the government was that both levels of appeal should be disposed of within the specified period.

Working Committee: Ajit Bhattacharjee, Anjali Bhardwaj, Aruna Roy, Bharat Dogra, Harsh Mander, Maja Daruwala, Nikhil Dey, Prabhsh Joshi, Prakash Kardaley, Prashant Bhushan, Shailesh Gandhi, Suman Sabai, Vishaish Uppal, Shekhar Singh (Convenor)

Box 16 contd..

It seems that when a sub-section was inserted between sub section (1) and sub-section (2) of section 19 of the final (amended) bill, and the original sub-section (2) was renumbered as sub-section (3), a corresponding change in numbering was erroneously not made in sub-section (6).

The relevant portions of section 16 of the December bill are reproduced below for your ready reference:

“16. (1) Any person who, does not receive a decision within the time specified in sub Appeal section (1) or clause (a) of sub-section (3) of section 8, or is aggrieved by a decision of the Public Information Officer, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Public Information Officer in each public authority:

Provided that such officer may admit the appeal after the expiry of the period of thirty days if he or she is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Commission:

Provided that the Commission may admit the appeal after the expiry of the period of ' ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(6) An appeal under sub-section (1) or sub-section (2) shall be disposed, of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing.”

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2. In Section 20(1), relating to penalties, the RTI Act lists various types of offences, including refusal to receive application, delay in furnishing information, mala fide denial, giving incorrect, incomplete or misleading information, destruction of information, or obstruction. For all these the act prescribes “... a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty five thousand rupees.”

However, the provision for a fine “each day” would only be relevant in the case of a delay in furnishing information. None of the other offences lend themselves to a “per day” assessment for imposition of a fine. This, again, seems to be an error that has crept in while amending the December 2004 bill, as in that bill there seems to be no mention of a daily fine but only of a “... fine which may extend to rupees twenty-five thousand...”. The relevant section of the December 2004 bill is given below for ready reference.

“17. (1) Notwithstanding anything contained in the provisions of section 20, where the Commission at the time of deciding any appeal is of the opinion that the Public Information Officer has persistently failed to provide information without any reasonable cause within the period specified under sub-section (1) of section 7, the Commission may authorise any officer of the Central Government to file a complaint against such Public Information Officer before a Judicial Magistrate of First Class.

(2) Any Public Information Officer who is in default under sub-section (1) shall be liable on conviction to fine which may extend to rupees twenty-five thousand or a term of imprisonment which may extend to five years, or with both.”

We hope you will urgently have these errors rectified so that the Act, when it becomes fully operational in October, can function smoothly.

With regards,

Yours sincerely,

Aruna Roy Shekhar Singh

On behalf of the National Campaign for People’s Right to Information

Shri Suresh Pachauri,
Minister, Ministry of Personnel, Public Grievances and Pensions
North Block, New Delhi - 110 011

26. Remanding appeals & complaints back without adjudication [S. 18(1) & S. 19(3)]

Section 18(1) and 19(3) of the RTI Act:

“18. (1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,—

- (a) who has been unable to submit a request to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;*
- (b) who has been refused access to any information requested under this Act;*
- (c) who has not been given a response to a request for information or access to information within the time limit specified under this Act;*
- (d) who has been required to pay an amount of fee which he or she considers unreasonable;*
- (e) who believes that he or she has been given incomplete, misleading or false information under this Act; and*
- (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.”*

“19(3) A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central information Commission or the State Information Commission:”

Major Issues

The RTI Act, in section 18(1) and 19(3), mandates that under certain circumstances a complaint or appeal (respectively) can be filed with the information commission. The information commission is given various specific and general powers to deal with complaints and appeals, and section 18(2) empowers the IC to initiate an enquiry relating to any complaint. Section 18(3) gives the IC powers of a civil court, while inquiring into any matter, including the power to summon documents and people.

Section 19(8), on the other hand, gives the IC wide ranging powers, which have been reiterated by the SC¹³⁶, to have an enquiry conducted, to require responses and justifications, to direct the provision of information, and to require the public authorities to *“take any such steps as may be necessary to secure compliance with the provisions of this Act”*. The IC also has the power to impose penalties for violations of the law emerging from both appeals and complaints, and to award compensation while disposing appeals.

Under the RTI Act, a citizen who is unable to secure information under the act, or who believes that there has been some other violation of the RTI Act, can approach the information commission in a complaint or a second appeal. While a complaint can be filed directly with the Commission, without following the process of a first appeal, a second appeal can only be filed after the appellant has exhausted

¹³⁶ SC CBSE 2011, for a discussion, see chapter 24(b) of this report.

the first appellate process. However, if after 45 days a person has not received the order of the first appellate authority, he or she is free to move a second appeal before the IC.

The one eventuality that the RTI Act does not seem to envisage is the referring of appeals and complaints to the PIOs or the first appellate authorities (FAAs). Despite this, in more than 10% of the orders analysed, the information commissions passed orders referring an appeal/complaint back to the PIO or the first appellate authority, without adjudicating on the matter. In fact, the CIC did not adjudicate on more than 90% of the complaints it received and simply remanded the complaints to the FAA or the PIO.

Referring a matter back to the PIO/FAA without adjudication, apart from not having any legal basis, seems a miscarriage of justice as people typically wait for months, sometimes years, for their appeals or complaints to be heard by the IC. If, at the end of this process, the IC simply refers the matter back to the PIO/FAA, without adjudicating and giving orders, then this sets the clock back by several months, even years, for the appellant or complainant. Of the appeals/complaints referred to PIO/FAA, four distinct categories emerge.

a) Remanding complaints/ appeals back to PIOs

A large proportion (80%) of the complaints in our sample, that were made to the ICs under S. 18, were remanded to the PIOs or FAAs, without examining the facts of the case or holding a hearing in the matter. The ICs, while referring the complaints, mostly directed the PIOs to provide the information sought and directed the complainant to file a first appeal under section 19 of the Act if the information was not provided. In the case of the Central Information Commission, 9% of the complaints in the sample were remanded back to the PIO.

Given the fact that the RTI Act mandates various exemptions, it would be a violation of the law for the commission to have directed the provision of the asked for information without first considering whether any of the exemptions were applicable. Where the PIO had rejected the application, it would also be a violation of the law for the commission to take a view on the refusal without giving an opportunity to the PIO to be heard, especially as the onus of proof is on the PIO. Also, if none of the exemptions were found to be applicable, then the reasons for that would need to be mentioned in the order. None of this appears to have been done.

After the Supreme Court order in *SC CIC Manipur 2011*, which essentially ruled that it was illegal to order the provision of information in response to a complaint, the directions of the IC to the PIO to provide information in response to a complaint would be considered illegal. Besides, as the imposition of penalty is mandatory if one or more of the specified violations of the RTI Act have taken place, and as the onus of proof is on the PIO, and as the law mandates that the PIO be given an opportunity to be heard in all penalty proceedings, the disposal of the complaint without imposing penalty, and without hearing the PIOs defence, are all violations of the law.

In many cases, without explanation or discussion, the ICs also remanded second appeals back to the PIO, and the appellants were directed to file a first appeal followed by a second appeal if information was not provided by the PIO. Legally, if an appellant had filed a second appeal without filing a first appeal, then the second appeal should not have been accepted by the registry of the commission, and the appellant should have been advised to file a first appeal with the FAA and only move the commission through a second appeal if the FAA orders were either not received within the stipulated time, or were not acceptable to the appellant.

At best, if the registry at the commission had made a mistake and accepted a second appeal without verifying that a first appeal had been filed, and the time limit for filing a first appeal had consequently

elapsed, the IC could request the FAA to consider using the discretionary powers provided in section 19(1) and admit the delayed appeal.

Where a first appeal had been filed and no order was received in the prescribed time-frame, or an unacceptable order received, there is no provisions in the RTI Act that could envisage the IC referring the matter back to the PIO, without adjudication and without directions to provide some or all of the asked for information, and whatever else was asked for in the appeal. Further, there seems to no advantage to sending the matter back to the PIO, except for illegitimately lowering the workload of the commission, and in fact such a remand would have put the appellant back to square one, certainly a grave injustice. Some examples of typical IC orders of this type are described below.

In a second appeal regarding deemed refusal, the CIC directed, “*In order to avoid multiple proceedings under sections 18 and 19 of the RTI Act, viz., complaints & appeals, this case is remitted to CPIO,*” with directions that PIO provide a reply within two weeks, and directed the appellant to file a first appeal and (if required) a second appeal, if not satisfied with the reply. There was no adjudication on penalties/violations of the Act. (***CIC/ 001023 dated 30.08.2013***).

In a similar case, the CIC directed the PIO to provide a reply within one week, and directed the complainant to file a first appeal if dissatisfied with the reply, with directions to the FAA to dispose the appeal once it is received. (***CIC/ 002428 dated 31.05.2013***).

b) Remanding appeals/ complaints back to FAA

i) Remanding appeals to FAAs:

In several cases of appeals, it was found that the ICs referred these appeals back to the FAA, without considering the facts and merits of the appeal, simply upheld the claim of the FAA that the file pertaining to the RTI matter was not received by them, was misplaced, or, in one case, that the FAA had directed that information was being collated and the appellant should wait.

In other cases, the IC, even after recording a finding that information had been wrongly denied, instead of ordering the disclosure of information, remanded the matter back to the FAA to revisit the matter.

Such directions undermine the timeframes laid out in the RTI Act and violate the applicant’s right to access information in a time-bound manner. Refusal of ICs to adjudicate on matters agitated before them and, remanding them instead to FAAs, defeats the whole purpose of having an independent appellate body under the law. Some typical orders are described below.

In a second appeal, the IC noted that the FAA had stated that the requisite information was being collected and appellant should wait. The IC added that the appellant filed a second appeal instead of waiting. The IC gave directions that the matter be remanded to the FAA stating:

“The CPIO’s response is not available in the Commission’s file. However, AA, vide letter dated 08.11.2012, had informed the appellant that the requisite information was being collected and had advised the appellant to wait for some time. However, the appellant filed the present appeal before this Commission without waiting for the response of the AA....It may be apt to mention that in the absence of the orders of the CPIO and AA, it would not be wise for this Commission to pass any orders regarding discloseability or non-discloseability of the information. Hence, the matter is being remanded to the General Manager (I/c), cum Appellate Authority... to dispose of the matter as per law in 05 weeks time, if not already done.” (***CIC/ 000305 dated 12.04.2013***).

The order indicates that the IC did not make any effort to adjudicate on the matter, nor was there any attempt to ascertain the response of the PIO. There was also no effort to find out what information was collected and provided to the appellant in the five months between the FAA’s letter to the appellant and the order of the IC. Instead of exercising its powers of ordering information disclosure, levying a penalty or

granting compensation, the IC resorted to the arbitrary and illegal measure of remanding the case to the FAA.

In another case, wherein information sought by the appellant was debarred from disclosure by the CPIO, under Section 8(1) (d) of the RTI Act, and the FAA concurred with the CPIO, the CIC stated that:

“In the circumstances, the matter is remitted back to the FAA with the directions to examine the matter, provide an opportunity to the appellant to be heard and pass a speaking order on this issue. Prima-facie the information ...sought for by the appellant, is not exempted u/s 8(1) (d) of the RTI Act. In case, the FAA finds that the same is exempted, he should give reasons and justification for nondisclosure of this information. The FAA will comply with the directions of the Commission within two weeks of receipt of this order. In case, the appellant is not satisfied with the reply of the FAA, he is at liberty to approach the Commission in second appeal afresh.” (CIC/ 001282 dated 05.11.2013).

Instead of adjudicating and ascertaining whether the exemption invoked was justified or not, the IC sent the matter back to the FAA and left it to the appellant to come back in a fresh appeal – setting back the clock for the information seeker by many months, even years.

Also, in some cases the IC remanded the matter back to the FAA even though the FAA had not responded in the legally mandated 45 days, giving the FAA more time. This, again, was without legal sanction and just added to the delays faced by the applicant.

ii) Remanding complaints to FAAs: 81% of the complaints before the CIC in the sample were referred to the FAA, directing the FAA to adjudicate on the matter. This was done despite the fact that the FAA is not involved in the process of hearing and deciding complaints. Not only is this a violation of the RTI Act but, in any case, the FAA has no powers to impose penalties which is the main purpose, mostly the sole purpose, of a complaint.

Surprisingly, the ICs often seemed to be under the mistaken impression that a complaint could not be entertained by the IC unless the complainant had approached the IC after filing a first appeal. This was despite the fact that there is no such requirement in the RTI Act and in fact one major difference between the appeals and complaints process is just that, the other being that filing of complaints is not time barred.

The procedure under 18 for filing complaints is different from the appellate mechanism of section 19, as a complaint can be made at any point during the process of seeking information for any violations of the Act, and can even be filed, where a person has been prevented from filing an RTI Application, or where the appellate process is concurrently ongoing.

In response to a complaint about a violation of the RTI Act, the IC has to recognise that the onus is on the PIO to legally establish that either a violation of the RTI Act did not occur, or that if it occurred then the PIO is not legally liable. In considering the complaint, the IC has only five options:

1. Either to determine, on the basis of inputs from all concerned parties, that no violation of the law occurred, and thereby dismiss the complaint; or
2. To establish (with or without an enquiry) that a violation did occur and then, on the basis of the defence put up by the PIO and inputs from other concerned parties, determine that the PIO is not liable to be penalised as per the law, and thereby close the matter.
3. Or determine that the PIO is liable and thereby award the penalty prescribed by law, and close the matter.
4. Or determine that the PIO is not liable for the penalty, because one of the extenuating conditions apply.
5. Also, where relevant, award compensation.

There is no scope whatsoever of referring the matter to the FAA, and given the fact that the Supreme Court has held in *SC CIC Manipur 2011*, that information cannot be directed to be supplied in response

to a complaint, there is nothing the FAA can do. Some typical examples of IC orders remanding complaints to FAAs are described below.

In a case where the complainant was dissatisfied with the reply of the PIO, the CIC remanded the complaint to the FAA directing the FAA to treat the copy of the Complaint as the First Appeal, stating that: *“The Commission has observed that the Complainant has not filed a First Appeal under Section 19(1) of the RTI Act and consequently, the First Appellate Authority (FAA) has not had the opportunity to review the PIO’s decision as envisaged under the RTI Act.”*

Instead of adjudicating on the complaint, the CIC directed the FAA to, *“decide the matter in accordance with the provisions of the RTI Act after giving all concerned parties an opportunity to be heard.”* (**CIC/000062 dated 02.04.2013** and similarly **CIC/ 000047dated 01.04.2013**).

In another case, an RTI application was filed in November 2015 and the first appeal was filed on 31.12.2015. The second appeal was filed on 19.02.2016 and was taken up for hearing on 18.05.2016. Just prior to the hearing, the PIO provided a reply, with a delay of more than 130 days. Instead of adjudication on the matter and penalising the PIO for the delay, the IC ordered:

“The Commission is of the considered view that it is a fit case to be remanded back to learned FAA with a direction to dispose of the Appellant’s FA filed on 31.12.2015, in accordance with the provisions of RTI Act 2005, within 30 days from the date of receipt of this order under intimation to the Commission. As such, the case is remanded back. The Appeal is disposed of accordingly.” (**CIC/000341 dated 18.05.2016**)

c) Refusing to adjudicate without FAA’s order

In several cases, the IC refused to adjudicate on an appeal, if the FAA’s order was not on record. These IC orders observed that it is mandatory for the FAA order to be part of the second appeal, failing which the matter cannot be adjudicated by the IC. The IC referred the matter back to the FAA and took it up for hearing only after the FAA passed an order on the first appeal.

Under Section 19 of the RTI Act, the FAA is ordinarily required to decide each appeal within a period of 30 days, extendable to 45 days, with reasons for delay to be recorded in writing. Therefore, if a person does not receive an order from the FAA and files a second appeal after the passage of 45 days from filing a first appeal, the second appeal is legally valid and must be adjudicated upon. In fact, section 19(3) explicitly says so:

“19(3) A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission:” (*Emphasis added*)

The refusal of the IC to adjudicate in such matters is a double wrong for appellants, as they are first denied justice by the FAA and subsequently, again for no fault of theirs, by the IC. This is especially problematic where there are long delays before cases come up before the ICs. A typical case is described below.

In its interim order dated 20.12.2012 , the IC held that it was mandatory to have the order of the FAA on record, failing which the IC cannot adjudicate on the matter. The appellant had already filed a first appeal on 9.10.2012 but had not received any order in response despite the passage of more than 70 days from the date of filing a FAA. However, the IC directed that the first appeal be remanded back to the FAA and the FAA to give its order in a time bound manner.

In the subsequent order dated 08.03.2013, the hearing was rescheduled, as the appellant was absent from the hearing. And in the final order dated 24.04.2013, the IC disposed the matter by stating that as the appellant had been absent for two hearings and had therefore not shown any interest in following up on the

matter, the case is closed (**SIC/BIH/85456 dated 20.12.2012**, with additional hearings on 08.03.2013 and 24.04.2013).

In another matter, the IC arrived at a finding that:

“respondents are not serious to fulfill the very object of RTI Act 2005 for which it was legislated by the Indian Parliament.”
(**CIC/ 000150 dated 30.03.2016**)

Despite this, the IC refused to adjudicate on the matter and remanded it back to the FAA as the FAA had not passed an order even though the stipulated time-frame for disposal of FAA had expired.

Another RTI application was filed in September 2013 to the Marine Products Export Development Authority, and the first appeal in the matter was filed in October 2013. The FAA, in its order dated 29.11.2013, held that the appeal is under consideration. During the hearing of the second appeal, the IC concluded that:

“Thus, it is legally inferred that First Appeal filed by the appellant could not be disposed of by the learned FAA for the reasons best known to him.”

The IC then disposed the matter holding that:

“the Commission is of the considered view that it is a fit case to be remanded back to learned FAA with a direction to dispose of the Appellant’s FA filed on 03.10.2013, in accordance with the provisions of RTI Act 2005, after bearing the appellant, within 30 days from the date of receipt of this order under intimation to the Commission. As such, the case is remanded back” (**CIC/901705 dated 04.05.2016**).

These directions appear to be in violation of the law as Section 19(6) specifies that the FAA must dispose a first appeal within a maximum of forty-five days, failing which the appellant is free to move a second appeal with the IC. There is no legal provision that the IC cannot hear the second appeal unless the FAA’s order has been received, nor is there any provision that gives the IC the discretion to remand the matter back to the FAA. By remanding the matter back, the IC illegally sets the clock back by many months for an applicant who has already had to wait for months for information.

Instead of taking any action against the FAAs, who were not performing their role properly and thereby causing a violation of citizens’ RTI, the ICs seem to be giving them another opportunity at the cost of the applicant. In fact, it can be argued that it would perhaps not have been out of line for the ICs to require PAs to initiate action against errant FAAs to ensure compliance with the RTI Act, using their implied powers (see chapter 24(b)(ii) for details), and the powers inherent in section 19(8) of the RTI Act.

d) Requiring FAAs to conduct enquiries

Under section 18(2) of the RTI Act, the IC has the power to initiate an enquiry into any matter it thinks fit. For this purpose, the IC has been given the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of certain matters [S. 18(3) of the RTI Act].

In certain cases ICs have been remanding appeals and complaints to the FAA with the direction that they enquire into the matter and report back to the IC. Such a remand and direction raises at least two questions.

First, whether the IC has the authority to direct or “require” the FAA, who is mostly an official not under the administrative control of the IC, to conduct an enquiry at the behest of the IC, without going through or at least seeking the concurrence of those who this official is administratively answerable to. A close reading of the powers of the IC, as listed under section 19(8) of the RTI Act, suggest that perhaps the IC does have this authority and the statutory means of enforcing this authority, as discussed in detail in chapter 24(e).

The second question is whether the IC can also empower the FAA, or whichever official it requires to conduct the enquiry, with the necessary powers. Here there is a problem, as the RTI Act, while empowering

the IC vide section 18(3), does not provide for the IC to further delegate these powers. Therefore, where the IC requires someone else to conduct the enquiry, they would be without the legal ability to do so.

A similar viewpoint is expressed by the Delhi High Court in **HC-DEL DDA 2010**, where it says:

“17...The power of inquiry under Section 18, which has been given to the Central and the State Information Commissions is confined to an inquiry by the concerned Information Commission itself. There can be no delegation of this power to any other committee or person.”

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19. It is clear that there is no provision under the RTI Act which empowers the Central Information Commission or, for that matter, the State Information Commission, to appoint a committee for conducting an inquiry for and on its behalf. The power of inquiry under Section 18, which has been given to the Central and the State Information Commissions is confined to an inquiry by the concerned Information Commission itself. There can be no delegation of this power to any other committee or person. —Delegatus non potest delegare” is a well-known maxim which means – in the absence of any power, a delegate cannot sub-delegate its power to another person (See: Pramod K. Pankaj v. State of Bihar & Others: 2004 (3) SCC 723)

Despite this, in several cases, the IC has been directing the FAA to cause an enquiry into the matter and submit its report to the IC in a time-bound manner. Specifically, 22 complaints related to refusal by the PIO to accept RTI applications, were disposed by the CIC with the direction:

“In exercise of the powers vested under Section 18(1) of the Right to Information (RTI) Act, the Commission directs the Appellate Authority to enquire into the allegations made by the Complainant and to send his comments/report within 3 weeks of receipt of the Order to take action on the concerned persons/officials, in terms of Section 20(1) of the Right to Information (RTI) Act.” (CIC/001777 dated 30.09.2013).

In another case, where the complainant received no reply from the PIO, the commission directed the FAA to treat the complaint as a first appeal and to also enquire and send an enquiry report to the commission. The IC directed that the report should contain the reasons for not furnishing information and for the delay in furnishing the complete information by the PIO. Responsibility should be fixed, identifying the officer(s) so responsible. The order stated that:

“While deciding the matter, the FAA is directed to examine whether any information was provided by the PIO within the mandated period and if provided, whether it was complete, relevant and correct. In the event that no information has been provided or if there are any deficiencies in the information furnished by the PIO, the FAA shall direct the PIO to provide the complete information ... Further, the FAA shall also enquire and send an enquiry report to the Commission containing the reasons for not furnishing and/or the delay in furnishing the complete information by the PIO affixing responsibility and identifying the officer(s) so responsible, if any.

Furthermore, if the complainant is not satisfied with the orders of the FAA, he will be free to move a second appeal before the Commission under Section 19(3) of the RTI Act.” (Decision No. CIC/ 000062 dated 02.04.2013).

One way of at least justifying a part of the above order could have been to argue that the IC was exercising the powers under S. 19(8) to have the matter enquired into. Especially, as discussed earlier, a 2010 order of the Delhi High Court (**HC-DEL DDA 2010**), which has jurisdiction over the CIC, had already held that section 18(2) can only authorise an enquiry by the commission itself.

e) Agenda for action

- i. ICs must debate among themselves and recognise the legal infirmities in referring appeals and complaints to PIOs and FAAs. They must themselves resolve not to do this.
- ii. Meanwhile, governments and other public authorities must instruct their PIOs and FAAs not to accept appeals and complaints sent by ICs to either reprocess, reconsider, or even consider for the

first time. They should also heed judicial orders, where relevant, on accepting directions of ICs to conduct enquiries relating to appeals and complaints.

- iii. Perhaps what would help is a definitive and unambiguous order of the Supreme Court outlawing the referral of appeals and complaints to PIOs and FAAs by the ICs. It should reiterate the need for the ICs to follow the due process prescribed by law, and adjudicate and give orders and directions on all appeals and complaints. The SC could be moved to that end.

27. Onus of proof on PIO [S. 19(5) & 20(1)]

Section 19(5) and 20(1) of the RTI Act:

“19(5) In any appeal proceedings, the onus to prove that a denial of a request was justified shall be on the Central Public Information Officer or State Public Information Officer, as the case may be, who denied the request.”

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“20(1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be”. (Emphasis added).

Major Issue

This is another one of those provisions of the RTI Act which is more practiced in the breach. In case after case the applicant is called upon to justify his or her complaint or appeal, rather than the PIO being called upon to justify the denial, the delay, the lack of response, or any of a host of violations that are regularly occurring. In fact, in a very large majority of the cases before information commissions, even show-cause notices are not issued to the PIOs, asking them to justify why they violated provisions of the RTI Act.

a) Unique role of the ICs

What is perhaps not widely recognised by the adjudicators is that by putting, on the PIOs, the onus of establishing that they acted justifiably, reasonably, and diligently, both for appeals and complaints, the Parliament has given the information commissions a role that is somewhat different to that of a court of law. In most court proceedings, the defendant is presumed innocent till proven guilty, with the onus on the prosecution to establish the guilt of the defendant. However, in proceedings relating to the RTI Act, before the information commission, the defendant PIO is presumed to be guilty, and the onus is on the defendant to establish his or her innocence.

Consequently, the information commission, once any refusal, delay, non-response, etc. has been reported, needs to work with the assumption that the refusal, delay etc. was illegitimate and that the PIO is legally liable and punishable for these, and unless the PIO can offer convincing and legally acceptable justifications, the commission has no option but to order remedial measures like disclosure of information, free supply of information, etc., and hold the PIO guilty for these violations and impose the penalty prescribed by law.

This implies that every order of the commission must either explicitly specify that no violation of the law occurred, or state why the justification provided by the PIO was found acceptable, or impose penalty. However, as discussed in greater detail in the chapter on penalties (chapter 28) and on the functioning of information commissions (chapter 5), in a vast majority of cases where there has been delay or other violations of the act, there is not even a query to the PIO on why this occurred, and no reasoned order

either upholding the justification offered by the PIO, or holding the PIO liable and imposing the prescribed penalty.

b) Poor awareness

The level of awareness of sections 19(5) and 20(1) seems very low among adjudicators. There is only one Supreme Court order which makes a reference to section 19(5), but in the process reveals that it was unaware of section 20(1) (***SC CIC Manipur 2011***, discussed in chapter 25(a) above).

c) Agenda for action

- i. The ICs need to urgently be made aware of the implications of this provision of the law, perhaps through the earlier suggested workshops, and through appropriate and binding judicial orders.
- ii. The ICs should also resolve to include in every order either a certification that there was no violation of the law, or a reasoned justification of why the PIO was not liable for the violation. Otherwise, in each case there must be an order imposing penalty on the PIO, as per the law.

28. Imposition of penalty [S. 20(1) read with 19(8)(c)]

Section 20(1) of the RTI Act:

“20. (1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.”

19(8)...In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—

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(c) impose any of the penalties provided under this Act;

Major Issues

The legal provision, obligating the imposition of penalties on errant PIOs, is the one provision that makes the RTI Act workable in India. When the RTI Act was being drafted, and advocated for, there was a broad consensus among most of the major stake holders in India that a statutory provision, for imposition of penalty on erring officials, was crucial if the RTI Act was to be effectively implemented. Interestingly, the original RTI bill, that was introduced in Parliament in 2004, had a provision whereby officials could be imprisoned for up to five years for violating specific provisions of the RTI Act. This provision was dropped before passing the bill, and only financial penalties were retained.

The imposition of penalties is perhaps the most vexatious of issues relating to the proper enforcement of the RTI Act. Though there is only one SC order which deals with this issue, and that also indirectly, nearly fifty HC orders have adjudicated on this issue. This makes penalties by far the most litigated issue at the High Court level.

The major issues litigated upon include the question whether the imposition of penalty is statutorily mandatory, whether warnings can be issued in lieu of penalties, whether the quantum of penalty can be varied, who can be penalised, and for what.

An IC order would be in conformity with section 20(1) of the RTI Act, only if it covered all the points listed in Box17. Almost none of the nearly two thousand randomly selected IC orders studied, as a part of this assessment, were in conformity with the statutory requirements!

a) The obligation to impose penalties

There are numerous HC orders that reiterate that it is mandatory to impose a penalty, as prescribed in section 20(1) of the RTI Act, if a PIO has violated the RTI Act in any one or more of the following ways:

- i. without any reasonable cause refused to receive an application
- ii. without any reasonable cause delayed furnishing information
- iii. with mala fide denied the request for information
- iv. knowingly given incorrect information
- v. knowingly given incomplete information
- vi. knowingly given misleading information
- vii. destroyed information which was the subject of any request
- viii. obstructed in any manner the furnishing of information

It is a settled legal position (see chapter 1(a) and (b) for further details) that the commission's orders must be speaking orders and must contain detailed reasons for the order. Therefore, whenever an appeal or a complaint provides evidence that one or more of the listed violations has occurred, the commission must either impose the prescribed penalty or give reasons why in its opinion the PIO has been able to establish that the relevant exception is applicable (reasonable cause, no mala fide, or not knowingly, as described above).

This is especially so because sections 19(5) and 20(1) of the RTI Act mandate that the PIO has the onus to prove that she or he had not committed a penalizable offence (for a detailed discussion on this point see chapter 27)

In ***HC-DEL Ankur Mutreja 2012***, the Delhi High Court reiterated the point that imposition of penalty was not essential for each violation of the Act, but then went on to say that it was mandatory for those which were without the appropriate legal justification, like reasonable cause, or lack of mala fide, or lack of intention, depending on which was relevant for which violation.

"8. It is clear from the language of Section 20(1) that only the opinion, whether the Information Officer has "without any reasonable cause" refused to receive the application for information or not furnished information within the prescribed time or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information etc., has to be formed "at the time of deciding the appeal". The proviso to Section 20(1) of the Act further requires the CIC to, after forming such opinion and before imposing any penalty, hear the Information Officer against whom penalty is proposed. Such hearing obviously has to be after the decision of the appeal. The reliance by the appellant on Section 19(8)(c) of the RTI Act is misconceived. The same only specifies the matters which the CIC is required to decide. The same cannot be read as a mandate to the CIC to pass the order of imposition of the penalty along with the decision of the appeal. Significantly, Section 19(10) of the Act requires CIC to decide the appeal "in accordance with such procedure as may be prescribed". The said procedure is prescribed in Section 20 of the Act, which requires the CIC to, at the time of deciding the appeal only form an opinion and not to impose the penalty.

9. The aforesaid procedure is even otherwise in consonance with logic and settled legal procedures. At the stage of allowing the appeal the CIC can only form an opinion as to the intentional violation if any by the Information Officer of the provisions of the Act. Significantly, imposition of penalty does not follow every violation of the Act but only such violations as are without reasonable cause, intentional and malafide." (Emphasis added)

In ***HC-HP Ved Prakash 2013***, the HC quoted an earlier HC order holding that just because the asked for information had been supplied, as a part of the pleadings in an appeal hearing, this did not immunise the PIO from being imposed the full penalty.

Further, the HC reiterated that imposition of penalty was mandatory and quoted another HC order to clarify that penalty should invariably be imposed when information is delayed without reasonable cause, and

the contention that penalty should be only imposed when there is a repeated violation, needs to be rejected. Also, lack of training can be no excuse.

“13. In Ramesh Sharma & Anr. Vs. State Information Commission, Haryana & Ors. MANU/PH/0325/2008 : AIR 2008 P&H 126, the Division Bench of Punjab and Haryana High Court has held that even in cases of simple delay Commission is empowered under sub-section (2) of Section 20 to recommend disciplinary action against State/Central Public Information Officer under Service Rules applicable to such officers. The imposition of penalty on Public Information Officer under Section 20(1) is mandatory. The Division Bench has held as under:

“5. A plain reading of Sub-section (1) of Section 20 of the Act makes it obvious that the Commission could impose the penalty for the simple reasons of delay in furnishing the information within the period specified by Sub-section (1) of Section 7 of the Act. According to Sub-section (1) of Section 7 of the Act, a period of 30 days has been provided for furnishing of information. If the information is not furnished within the time specified by 'Sub-section (1) of Section 7 of the Act then under Sub-section (1) of Section 20 of the Act, public authorities failing in furnishing the requisite information could be penalised. It is true that in cases of intentional delay, the same provision could be invoked but in cases where there is simple delay the Commission has been clothed with adequate power. Therefore, the first argument that the penalty under Sub-section (1) of Section 20 of the Act could be imposed, only in Cases where there is repeated failure to furnish the information and that too without any reasonable cause, is liable to be rejected. ... The second submission that lenient view should have been taken on account of failure of the Government to organise any programme to train public authorities as envisaged by Section 26 of the Act is equally without merit..”(emphasis added)”

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“16. In Johnson B. Fernandes V. Goa State Information Commission, Panaji, Goa & Anr, MANU/MH/0714/2011 : AIR 2012 Bom 56, the learned Single Judge has upheld the imposition of penalty upon the Information Officer, who has not supplied the information within the stipulated period of thirty days. The learned Single Judge has held as under:

“4. Mr. Menezes, the learned counsel for respondent No. 2, submitted that the appeal was preferred to the State Information Commissioner because it is the duty of the Information Officer to supply the information to the person who seeks it directly and not by including the said information in the pleadings when the matter is taken up in appeal. There is merit in this contention. Undoubtedly, the law contemplates supply of information by the Information Officer to the party who seeks it within the time stipulated. Therefore, it cannot be said that the appeal before the State Information Commissioner was untenable.”

There are also many Supreme Court orders that hold that courts and other adjudicators cannot ignore the language and intention of a statute and cannot, under the guise of interpretation, curb the scope, change or add to the meaning intended by Parliament, thereby usurping a legislative role (for detailed discussion and citations, see chapter 1(c)).

Despite this, in an overwhelming proportion of orders, information commissioners have failed to impose penalties, and have failed to even ask the PIOs to give their justification for violating the law. Consequently, in a majority of the cases, there has been no determination of whether there were justifiable reasons to waive penalties, and the subsequent non-imposition of penalties is clearly illegal.

In 59% of the IC orders, in the sample studied as a part of this study, it was obvious that the PIO was liable to be penalized at least for delay in responding, or delay in providing information, or for denial of information. In only 1.3% of the cases where penalty was impossible was it actually imposed. The state-wise break-up is in Table VIII, chapter 5 of this report.

This figure only relates to penalties on account of delay or illegitimate denial, i.e. where the IC order records that information was not provided, and directs that it be provided, or where the order records that information was provided after the expiry of the stipulated time-frame or where the IC found that the

information was incorrectly denied. In terms of other grounds for penalty, it is difficult to determine which of the cases attract a penalty for one or more of the other violations listed in the RTI Act, because a large proportion of the orders are too cryptic to allow such a determination.

As discussed earlier, considering the onus of proof that the PIO acted legally was on the PIO (S. 19(5) and 20(1)), at the very least where ever there was delay or refusal, or where the IC allowed part or all of the information denied earlier by the PIO, the PIO should have been required to establish that there was reasonable cause for delay, or that the refusal of part or whole of the information sought was bonafide. Similarly, where incorrect, incomplete or misleading information was provided, the law required the PIO to prove that this happened without the PIOs knowledge. Interestingly, the law recognizes no mitigating factors for obstruction in the provision of information or for the destruction of information sought for under the RTI Act.

Therefore, it became essential in all such cases for the information commissions to issue a notice to the PIO asking for a justification. Unfortunately, as discussed above, in very few of the orders in the sample of orders analysed, were such show-cause notices issued. In most cases, the justification to be mandatorily offered by the PIO was neither insisted upon, nor even asked for, by the information commissions. As per the sample analysed for this study, in only about 24% of the cases where penalty was imposable was there a show cause notice issued. In less than 5% was there a follow up to the show cause notice in terms of a final order being issued.

In a case before the CIC, despite delay of more than one year, the IC did not discuss or levy penalty in its order dated 24.3.2014. *“At the outset, the Respondent submitted that he is willing to supply the information sought by the Appellant vide his RTI application dt.11.2.13 within ten days. 3. In view of the above assurance, the appeal is closed at the Commission’s end.” (CIC/001443 dated 24.03.2014)*

In another order, in December 2013, pertaining to an RTI application filed in October 2011, i.e. more than 2 years ago, the IC disposed the case with directions that information be provided, without explaining why penalty was not being levied. *“As agreed by the CPIO he should provide the information requested by the appellant in his RTI application 04/10/2011 within 15 days from the date of receipt of this order. If, however, no such information is found on record the same should be clearly informed to the appellant.” (CIC/002814 dated 26.12.2013)*

In one order, the IC issued a show cause notice for penalty upon finding that the PIO had not responded to the RTI Application, and delay of more than 100 days had occurred. But after the show cause hearing, the IC dropped the penalty, recording: *“However, as there is no malafide intention of the CPIO as the CPIO was acting in good faith, the show cause proceeding is being dropped. The CPIO is advised to be careful in future.” (CIC/ 001400 dated 16.05.2014)*. This was despite the fact that lack of mala fide is not a legally accepted justification for delays, and in any case the onus of proof was on the PIO!

In a case decided by the Bihar SIC, the IC held that the RTI Act required that in order to impose penalty it would have to be proved that the PIO deliberately did not give information, or gave wrong information, and as these grounds are not established, penalty is dropped. *(SIC/BIH/81651 dated 16.07.2013)*.

हुआ है। सूचना के अधिकार अधिनियम की धारा-20(1) के तहत दंडात्मक कार्रवाई के लिये जानबूझकर सूचना नहीं देने या गलत सूचना देने के लिये इन सभी बातों का सबूत होना चाहिये, जो वर्तमान मामले में साबित नहीं है। अतः आयोग के विचार में लोक सूचना पदाधिकारी पर दंडात्मक कार्रवाई करने का कोई आवश्यकता नहीं है।

Could there be a more creative misinterpretation of the law?

In short, the ICs seem to have collectively decided to ignore the provisions of the RTI Act, as passed by Parliament, and do not even feel the need to justify why they are ignoring the provision requiring

mandatory imposition of penalties. They either assume that the PIO, despite whatever provisions of the law he or she has violated, is not liable for penalty, or that ICs have the authority to waive this liability, even where it is established beyond all doubts.

It needs to be debated with legal luminaries, and perhaps adjudicated on by the Supreme Court, whether commissioners can be prosecuted if they do not impose penalties, even when these are clearly required to be imposed by law. In so far as they cause a loss to the exchequer through their deficient orders, perhaps they can be prosecuted under section 218 of the Indian Penal Code, which reads:

“Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. (Emphasis added)

Perhaps it also needs to be debated and adjudicated on whether ICs should be liable to be prosecuted under provisions of the Prevention of Corruption Act, specifically section 13(1)(d):

“(1) A public servant is said to commit the offence of criminal misconduct,-

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(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;” (Emphasis added)

In fact, a commissioner could even be removed under section 14(1) and 17(1) of the RTI Act, as an unwillingness to work in conformity with the law could well be described as misbehaviour, or incapacity, or both.

Perhaps these suggestions appear too harsh. However, given the flagrant violations of the provisions of the RTI Act by the ICs, and the resulting disregard of the RTI Act by public servants, it has become imperative that some action be taken to protect the RTI Act before it becomes an ineffective and mostly forgotten legislation, as has been the fate of many other laws in India. In 98.7% of the cases studied, ICs violated the law regarding the imposition of penalties, and yet they face little or no adverse consequences either in the form of legal action or even widespread public condemnation. Unless things change soon, the people of India might very well live to regret not having acted decisively, and earlier, to reform the commissions.

b) Illegitimate non-imposition of penalty

Apart from the exceptions listed in the RTI Act, and summarised above (essentially reasonable cause, bonafide, and unknowingly), some new exemptions were sought to be used, both by PIOs and by ICs. There were struck down by various High Court orders.

In ***HC-DEL Prem Lata 2012***, the Delhi High Court held that mala fide did not have to be established each time a penalty was to be imposed. The HC rightly held that only where a request was denied did the need to determine that there was mala fide become relevant. In other cases, other factors became relevant.

“24. The submission of the petitioner that the CIC cannot impose penalty under Section 20 (1) of the Act without recording a finding as to the mala fides on the part of the CPIO is entirely misconceived and untenable.

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“25. Therefore for the CIC to impose penalty under Section 20 (1) of the Act it has to be of the opinion that the CPIO has, without any reasonable cause:

(i) refused to receive an application for information; or

(ii) not furnished information within the time specified under sub-section (1) of section 7; or

(iii) malafidely denied the request for information; or

(iv) knowingly given incorrect, incomplete or misleading information; or

(v) destroyed information which was the subject of the request; or

(vi) obstructed in any manner in furnishing the information.

The use of the word "or" repeatedly in section 20 shows that the various situations/ contingencies dealt with in section 20 are disjunctive. The PIO concerned would invite penalties under section 20 of the Act upon the occurrence of any of the contingencies mentioned hereinabove. A recording that the CPIO has acted malafidely in denying the request for information is not the sole criterion for imposing penalty. The CIC by the impugned order dated 07.02.2012 has imposed penalty since the petitioner has, without any reasonable cause, not furnished the information within the time specified under sub-section (1) of Section 7.”

In **HC-CAL Madhab Kumar Bandhopadhyay 2013**, the HC held that just because the PIO had complied with the orders of the Commission did not mean that penalty was not imposable on him.

“21. I am unable to accept that once the petitioner complied with the order of the Commission dated January 9, 2009, though belatedly, penalty under S. 20(1) of the Right Information Act, 2005 could not be imposed on him. Nor do I see any reason to accept the argument that in each and every case the Commission is not supposed to impose Rs. 250 penalty per day.

22. It is evident that in all the cases mentioned in sub-sec. (1) of S. 20, it is the duty of the Commission to impose a Rs. 250 daily penalty till the application for information is received or the information is given. The only thing is that the total penalty amount should not exceed Rs. 25,000. The proportionality principle based on the gravity of the proven charge concept cannot apply to a case under S. 20. That will amount to unauthorised reduction of the penalty amount. A S. 20 case can be a case of penalty or no penalty, but not a case of reduced penalty.”

In **HC-BOM Mahendra 2013**, the High Court made the important point that even if a PIO forwarded the RTI application to other PIOs, if the original PIO was in a position to supply the requested information, then he or she was liable for imposition of penalty.

“13. Therefore, upon careful perusal of observations/reasons recorded by respondent No. 1, it appears that, even the petitioner could have furnished information as sought by respondent No. 2. This finding recorded by the respondent No. 1 is based upon the material placed on record.

14. The contention of the petitioner that, since the petitioner was not responsible to supply information and in absence of fastening liability on the B.D.O., and Talathi, no penalty could have been imposed upon the petitioner, deserves no consideration since penalty is imposed after recording finding that, even the petitioner could have supplied the said information, however, he tried to avoid to furnish such information as prayed by respondent No. 2 in his application dated 30/11/2010. It further appears that, not only that, the second appellate authority has adverted to the written documents/material placed on record, however, the petitioner was given opportunity to put forth his contention before the second appellate authority. Therefore, there is no substance in the contention that, the petitioner was not heard before imposing such penalty under section 25 of the said Act. While considering the case in its entirety under extraordinary writ jurisdiction, in the light of discussion herein above, view taken by the second appellate authority i.e., respondent No. 1 appears to be plausible, reasonable and in consonance with the material placed on record. No case is made out for interference in the impugned judgment and order. Writ Petition sans merit, hence rejected.”

In **HC-DEL JP Agrawal 2011**, the HC held that a penalty can be imposed not just for delay but for non-application of mind. Specifically, the HC held that PIOs cannot escape by stating that his or her subordinates have not provided the information or documents.

“7. .. The Act having required the PIOs to "deal with" the request for information and to "render reasonable assistance" to the information seekers, cannot be said to have intended the PIOs to be merely Post Offices as the Petitioner would contend. The expression "deal with", in *Karen Lambert v. London Borough of Southwark* (2003) EWHC 2121 (Admin) was held to include everything right from receipt of the application till the issue of decision thereon. Under Section 6(1) and 7 (1) of the RTI Act, it is the PIO to whom the application is submitted and it is he who is responsible for ensuring that the information as sought is provided to the applicant within the statutory requirements of the Act. Section 5(4) is simply to strengthen the authority of the PIO within the department; if the PIO finds a default by those from whom he has sought information, the PIO is expected to recommend a remedial action to be taken. The RTI Act makes the PIO the pivot for enforcing the implementation of the Act.

8. .. The CIC has found that the information furnished by the Respondent No. 4 and/or his department and/or his administrative unit was not what was sought and that the Petitioner as PIO, without applying his mind merely forwarded the same to the information seeker. Again, as aforesaid the Petitioner has not been able to urge any ground on this aspect. The PIO is expected to apply his / her mind, duly analyse the material before him / her and then either disclose the information sought or give grounds for nondisclosure. A responsible officer cannot escape his responsibility by saying that he depends on the work of his subordinates. The PIO has to apply his own mind independently and take the appropriate decision and cannot blindly approve / forward what his subordinates have done.

9. This Court in *Mujibur Rehman v. Central Information Commission* MANU/DE/0542/2009 held that information seekers are to be furnished what they ask for and are not to be driven away through filibustering tactics and it is to ensure a culture of information disclosure that penalty provisions have been provided in the RTI Act. The Act has conferred the duty to ensure compliance on the PIO. This Court in *Vivek Mittal v. B.P. Srivastava* MANU/DE/4315/2009 held that a PIO cannot escape his obligations and duties by stating that persons appointed under him had failed to collect documents and information; that the Act as framed casts obligation upon the PIO to ensure that the provisions of the Act are fully complied. Even otherwise, the settled position in law is that an officer entrusted with the duty is not to act mechanically. The Supreme Court as far back as in *Secretary, Haila Kandi Bar Association v. State of Assam* MANU/SC/1331/1995 : 1995 Supp. (3) SCC 736 reminded the high ranking officers generally, not to mechanically forward the information collected through subordinates. The RTI Act has placed confidence in the objectivity of a person appointed as the PIO and when the PIO mechanically forwards the report of his subordinates, he betrays a casual approach shaking the confidence placed in him and duties the probative value of his position and the report.

10. Thus No. fault can be found with the order of the CIC apportioning the penalty of `25,000/- equally between the Petitioner and the Respondent No. 4.” (Emphasis added)

Despite this, there are numerous IC orders refusing to impose a penalty even where it is clearly indicated. Some typical examples are described below.

During a second appeal hearing, the IC arrived at the finding that:

“The Commission is of the considered view that the appellant has been **deprived** by the respondents **deliberately** from having the benefits of the RTI Act 2005, **even after lapse of more than seven months period.** Thus, the respondents **have defeated the very purpose** of the RTI Act 2005 for which it was legislated by Parliament of India.” (CIC/000910 dated 01.02.2016)

However, despite the categorical finding, the IC failed to penalise the PIO for violating the RTI Act. Inexplicably, the order does not even discuss or mention the penal provisions of the RTI Act and does not record any reason for not imposing penalty. Another similar order is **CIC/001286 dated 11.03.2016.**

In another case, while disposing a complaint, the IC recorded in the order that information had been provided more than 900 days after it was sought. The RTI application was filed on 31.10.2013 while the reply was provided a day before the CIC hearing, on 11.05.2016.

The respondent authority, upon being questioned for the delay, claimed that the delay occurred on account of confusion within the public authority regarding who would be the competent authority and PIO to deal with such matters. Despite the massive delay and clear violation of the RTI Act, the IC closed the matter without penalising the PIO:

“With respect to the delay in resolving the matter, the Commission cautions the respondent to be careful in replying to RTI matters within the specified time limits upholding and respecting the spirit of the law.” (CIC/900138 dated 12.05.2016).

In another complaint, it emerged that the PIO of the Central Information Commission had not provided full information, even though the RTI application had been filed almost 800 days prior to the hearing, on 05.03.2014. Accepting the delay in providing information, the order recorded:

“respondent submitted that due to oversight inspection could not be provided to the complainant. The respondent tenders his unconditional apology for this lapse and requested the Commission to condone the same.” (CIC/000272 dated 11.05.2016).

Further, the order states that during the hearing the complainant:

“submitted that he is only interested in getting the information and hence, is not pressing for imposition of penalty on the CPIO”.

Despite the obvious violation of the RTI Act, the IC did not impose any penalty on the PIO. The decision of the complainant to not press for penalty was immaterial in the matter, as the law does not empower the information seeker or complainant to determine whether or not a penalty is to be levied. Section 20 provides for mandatory penalties to be imposed by ICs, in cases of the specified violations of the RTI Act, including for not providing information in the stipulated time-frame.

As discussed elsewhere in the report, while the Assam SIC issued a large number of show cause notices, almost in every case where there was a violation, yet it failed to follow up on the show cause notice. For instance, while hearing a matter related to DRDA, Silchar, Cachar, the SIC in its order observed, *“The SPIO in the office of the PD, DRDA, Cachar has not complied with the direction of the Commission through its hearing notice dated 28/8/2015 and 5/1/2016 to make a Written Submission regarding furnishing of information and to explain as to why penalty shall not be imposed on him/her Under Section 20 (1) of the RTI Act, 2005 for his/her failure to furnish the information to the Applicant within the stipulated period of 30 days.”*

However, despite the PIO failing to comply with the directions of the SIC twice, the SIC inexplicably dismissed the matter with the direction that the PA provide the relevant information to the applicant and that the FAA pass a speaking order on the first appeal of the applicant. The SIC did not impose any penalty in the matter. *(SIC/ASS/CCR.129/2012 dated 01.02.2016)*

Failure to follow up on show cause notices and not imposing penalties in matters where the PIO has not responded to the show cause, blunts the efficacy and the deterrence value of the penal clauses.

In several matters where the PIO failed to respond to the show cause notices issued by the SIC, in flagrant non-compliance with the SIC's orders, rather than imposing penalties, the SIC again issued show cause notices to the PIO. (see *SIC/ASS/CCR.216/2012 dated 06.01.2016, SIC/ASS/DHR.44/2013 dated 01.03.2016 and SIC/ASS/HLK.7/2015 dated 05.02.2016*)

c) Refusing to adjudicate on veracity of information

In several cases, it was found that ICs refused to adjudicate on matters wherein the information seeker questioned the veracity or correctness of information provided under the RTI Act. Instead, the IC directed the information seeker to approach the appropriate authority, claiming that it was not the responsibility of the IC to look into the authenticity of the information provided under the RTI Act.

This is despite Section 20, that mandates the imposition of penalty for knowingly providing misleading or incorrect information in response to an RTI application. Therefore, wherever an appellant or complainant alleges that incorrect or misleading information has been provided, apart from examining the matter to establish the correct position, the IC is also duty bound to penalise the PIO under Section 20 of the RTI Act, unless the PIO can establish that the false or misleading information was provided unknowingly.

Nevertheless, in one case an RTI applicant had sought copies of estimate books, decisions taken at a public meeting and register of the executive committee meetings. Information was provided prior to the hearing at the IC, but during the hearing, the appellant stated that he was not satisfied with the information and stated that incorrect and unreliable information has been provided to him. The commissioner closed the matter directing the appellant to raise the issue of irregularities in the information with the appropriate official (**SIC/BIH/78192 dated 31.10.2013**).

In another matter before the Bihar SIC, the appellant claimed that there were discrepancies between the information provided under the RTI Act from two different departments. The information had been provided just a few days prior to the SIC hearing. The commissioner closed the matter with the direction that a copy of the IC order be sent to the Secretary of the public authority to look into the matter. This was even though the issue of conflicting information should have been dealt with by the SIC itself, as the RTI Act mandates a penalty for supply of incorrect, incomplete or misleading information. By closing the matter and passing the responsibility to the Secretary to examine the matter, the commission failed to fulfil its statutory obligation and denied the information seeker the right to correct and authentic information (**SIC/BIH/88478 dated 12.08.2013**).

During the hearing of another appeal before the Bihar SIC, the appellant stated that the information that she had received appeared to have been tampered with. Refusing to adjudicate on the veracity of the information, the IC closed the case and held that for seeking relief, the appellant should approach the appropriate court (**SIC/BIH/70681 dated 08.05.2013**).

d) Letting off PIOs with warnings

In several cases, it was found that even after recording a violation of the RTI Act, the IC let off the PIO with a warning or, during a show cause hearing, accepted an apology from the PIO and did not levy a penalty. These directions are without a legal basis, as once the IC has recorded a violation, the IC must proceed with the penalty process. The RTI Act does not provide any basis for letting off PIOs by accepting apologies or issuing warnings.

The Punjab & Haryana High Court, in **HC-P&H Smt. Chander Kanta 2016**, held that:

“The SPIO appeared before the SIC in pursuance of the show cause notice and admitted his fault and tendered unqualified apology for the delay caused, which was of more than 100 days but vide order dated 16.06.2014, SIC warned the SPIO to be more careful in future and the proceedings issued by the show cause notice were dropped...The only argument raised by the petitioner is that there is no jurisdiction with the SIC to let off the erring officer with a warning only as according to her, the scheme of the Act provides either to award punishment of `250/- per day or to award no punishment...The aforesaid provision specifically stipulates imposition of penalty of `250/- for each day till the application is received and information is furnished but it should not exceed `25,000/- in all. This provision has already been interpreted by the Division Bench of the Himachal Pradesh High Court in Sanjay Hindwan's case (supra) in which it has been held that either the penalty has to be imposed at the rate fixed or no penalty has to be imposed. I fully concur with the observations made by the Division Bench of the Himachal Pradesh High Court in Sanjay Hindwan's case (supra). Accordingly, the order passed by the SIC dated 16.06.2014 is set aside and the matter is remanded back to him to decide it again strictly in terms of Section 20 of the Act and the interpretation made by this Court.”

In one case the IC ordered that information be provided, after more than one year from the time the RTI application was filed. Yet, the IC let off the PIO with a warning:

“The CPIO, who received the appellant’s RTI application, is warned to exercise due care to ensure that the correct and complete information is furnished timely to the RTI applicant(s) as per provisions of the Act failing which penal proceedings under Section 20 may be initiated in future.” (CIC/000799 dated 24.05.2013).

All this, without any legal authority.

And in its order dated February 2014, the CIC found that information had not been provided, but let off the PIO with a warning:

“The CPIO, Mumbai is directed to permit the appellant to inspect the relevant records relating to his RTI application dated 28/08/2012 and also allow him to take photocopies/ extracts therefrom, free of cost, upto 10 pages within 7 days from the date of receipt of this order. The CPIO is further directed to refund the fee of Rs.8/- recovered from the appellant. The CPIO is advised to exercise due care for future and ensure that the provisions of the RTI Act are meticulously followed while dealing with RTI matters.” (CIC/000300 dated 20.02.2014)

This order failed to impose penalty, and also illegally curbed to ten pages the right of the applicant to receive delayed information free of charge.

e) The quantum of penalty

Though there are no SC orders on this, HC orders appeared mutually contradictory. One set held that the IC or even the courts did not have the authority to vary the amount, as specified in section 20(1). Another set of HC orders maintained that the quantum of penalty could be varied according to circumstances and discretion, but offered no concrete legal justification for this. A third set questioned whether High Courts, in exercise of their writ jurisdiction under Article 226 of the Constitution, should at all tamper with the quantum of penalty awarded by information commissions, *“unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/ Tribunal” (HC-DEL Dr. Neelam Bhalla 2014, para 5).*

Section 20(1) of the RTI Act clearly mandates that penalty should be ₹ 250 per day, “till application is received or information is furnished”, and not exceed ₹ 25,000. Therefore, there seems to be little scope to vary the quantum of penalty where there is delay in receiving an application or providing information. Delay in providing information also happens to be by far the most commonly occurring violation of the RTI Act. Perhaps all that could be permissible is to determine whether a part of the delay could be condoned because of “reasonable cause”, and then penalise for the remaining days.

Section 20(1) only specifies a per day penalty, while many of the other violations cannot easily be measured on a daily basis. Therefore, in such cases the commission has a discretion with an upper limit of ₹ 25,000. Though this anomaly was pointed out to the Government of India, soon after the RTI Act was passed by Parliament and while there was still an opportunity to correct such inadvertent anomalies (see point 2 in letter in Box 16 in chapter 25), the government chose to ignore the issue.

Be that as it may, if a PIO without bonafide reasons denies a request, or knowingly gives incorrect, incomplete, or misleading information, or destroys, or obstructs the furnishing of, information, then how is this to be converted to a daily rate. Therefore, in such cases there will have to be a leeway to determine the quantum on the basis of circumstances, subject to all the checks and balances that are applicable to the exercise of discretionary powers.

In *HC-CAL Madhab Kumar Bandhopadhyay 2013* (quoted earlier), the HC reiterates that it is the duty of the commission to impose a penalty of ₹250 per day and there is no provision for a reduced rate.

In *HC-HP Sanjay Hindwan 2013*, the HC similarly holds that that the IC has no authority to reduce or enhance the penalty amount, which has to be strictly as per the provisions of the law.

“3. It is thus clear from the reading of this order that the State Chief Information Commissioner came to the conclusion that there was at least a delay of 14 days if not more in supplying the information. Section 20 of the Act clearly lays down that in case the Commission concerned comes to the conclusion that the information has not been supplied within time without any reasonable cause or has been refused to be given for other mala fide reasons, etc. then the Commission shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished. The only caveat is that the total amount of penalty should not in any event exceed Rs. 25,000/-.

4. We find no provision in the Act which empowers the Commission to either reduce or enhance this penalty. If the Commission comes to the conclusion that there are reasonable grounds for delay or that the Public Information Officer (P.I.O.) concerned has satisfactorily explained the delay then no penalty can be imposed. However, once the Commission comes to the conclusion that the penalty has to be imposed then the same must be @ Rs. 250/- per day and not at any other rate at the whims and fancy of the Commission. To this extent the petitioner is absolutely right. The penalty either has to be imposed at the rate fixed or no penalty has to be imposed. We, therefore, allow the writ petition and without going into the question as to what was the actual delay but accepting the finding of the Commission that the delay was 14 days, impose penalty @ of Rs. 250/- per day, which works out to Rs. 3,500/-. We allow the petition in the aforesaid terms and the penalty is enhanced from Rs. 1,500/- to Rs. 3,500/ Respondent No. 3 is directed to deposit the enhanced amount of penalty i.e. Rs. 2,000/- in the Government treasury within two weeks from today... “(Emphasis added)

In one order, the IC recorded that the PA had caused a long delay in providing the information. IC noted that two officials had delayed disclosure of information by more than 15 months. Further, the IC rejected the explanations given by the officials to the show cause notice. However, instead of penalising the maximum amount possible under the law i.e. ₹ 25,000 for causing delay of more than 100 days, the IC penalised the officials only ₹ 1000 each, recording: *“Rejecting the explanations given, under Section 20(1) each official is fined Rs. 1000 each”*. Such an order is without a legal basis as the quantum of penalty, especially in cases of delay is stipulated in the law. Further, no mitigating circumstances due to which a lesser amount was levied was recorded in the order. (**SIC/BIH/72896 dated 31.12.2013**).

In another order, a PIO was issued a show cause notice as the IC observed that the PIO had replied to the RTI application after a delay of almost 5 months. However, the PIO did not respond to the show cause notice. In the subsequent hearing, despite the clear evidence of the PIO violating the RTI Act by not providing information in the stipulated timeframe, the IC closed the case by imposing a token penalty of only ₹ 2,000:

*“Though the CPIO deserves maximum penalty, still I would like to provide him one more opportunity so that he will not come up for such notice in future and he will diligently observe RTI rules and regulations while handling RTI applications. Therefore, I impose only a token penalty of Rs. 2,000/- on him”. (**CIC/3111 dated 24.11.2008**)*

In another matter, the IC recorded the contention of the PIO that “because of excessive pressure of work, he could not respond to the RTI application.” The PIO went on to claim that the information could not be provided as “he was over occupied in connection with the marriage of his daughter”. Despite noting that the PIO caused a delay of more than 5 months by not responding to the RTI application and disregarding the orders of the FAA, the IC reduced the quantum of penalty:

*“The explanation rendered by Shri Ram is not wholly satisfactory, even though there are certain mitigating circumstances mentioned above. Hence, it will suffice if token penalty of Rs.500/- is imposed on him and he is also warned to be careful in future.” (**CIC/001537 dated 28.11.2011**)*

In another case, while hearing a matter related to the DoPT, the IC recorded that information had been provided almost two years after it was sought. The PIO claimed that due to work overload the RTI application could not be replied to and apologized to the appellant. The IC, in its order, held:

“The Commission observes that the then CPIO Shri Rajiv Jain did not reply to the RTI application dated 05.02.2014 within the stipulated time in violation of the provisions of the RTI Act. The Commission, therefore, imposes a token penalty of Rs. 2,500” (CIC/903737 dated 19.02.2016).

Not only is the imposition of an arbitrary quantum of penalty without a legal basis, the IC’s seeming acceptance of a vague explanation of “work overload” from a central ministry, which in fact is the nodal agency for the implementation of the RTI Act, undermines the deterrence value of the penalty clause.

f) Some consequences of not imposing penalties

Non-imposition of penalties by commissions in clearly deserving cases sends a signal to the PIOs that violating the law will not invite any serious consequences. This destroys the basic framework of incentives and disincentives built into the RTI law, and promotes a culture of impunity.

Though an accurate estimate is difficult, on the basis of information available, a very conservative estimate would suggest that at least 285 crores of rupees are being lost by the public exchequer every year because of the propensity of information commissioners to violate the RTI Act and not impose the penalties due.

But, even more important than the revenue lost is the loss of deterrence value that the threat of penalty was supposed to have provided. This has resulted in PIOs denying information, sending information late, not responding at all, or violating other provisions of the RTI Act with impunity, and without fear of consequences.

The analysis done in the earlier RaaG report¹³⁷ showed that, as an average, information was only provided to 45% of the RTI applicants, and that the average time taken to provide information was 60 days, while the legally mandated maximum is 30 days.

The main reason why PIOs, in such a large proportion of cases, either do not respond at all, or do not respond in time, and in one way or another make access to information difficult, is most likely as a result of the exceptionally poor implementation of the mandatory penalty provisions provided in the RTI Act.

The laxity in imposing penalties is also allowing PIOs to take liberties with the RTI Act, at the cost of the public. For example, there is an increasing tendency among PIOs to insist that applicants come and search for the information themselves, even if they live in some distant town or village, and even if the information they want is accurately and specifically indicated, and not scattered and therefore difficult to compile (for more details on this, see chapter 13(a)).

Similarly, in an increasing number of cases, PIOs are transferring RTI applications to a host of other PIOs within the same public authority and asking these PIOs to directly deal with the applicant. This means that a single application can get transformed into two dozen or more, each of which must be monitored, pursued and appealed for, often resulting in the applicant being overwhelmed and abandoning the application. Though this has been held to be illegal (see chapter 11(a) for details), it continues to be practiced.

The tendency to use and misuse whatever exemptions are available in the RTI Act, and many which are not mentioned in the act, has been increasingly manifesting itself among PIOs. PIOs are refusing information by sending a denial (often a photocopy of a proforma denial) quoting all possible exceptions or, as has been observed on occasion, just citing section 8, or at best section 8(1), and leaving it to the applicant to pick the sub-clause by which she prefers to have her application rejected!

This is despite the fact that when the RTI bill was presented to Parliament, it stated that exemptions had been kept to the minimum and even those that existed were not absolute, and stressing the importance of transparency in a country like India, noted that the exempt information could be disclosed in public interest.

¹³⁷ Page 70, Chapter 6, RaaG & CES, 2014, *Op cit*

This has also resulted in a huge volume of second appeals and complaints with information commissions (currently estimated to be 347977 for 18 ICs from Jan 2014 to December 2015 – see table IV in chapter 5), and the consequent long wait before appeals and complaints come up for consideration (see table VII in chapter 5). In fact, the huge backlog of appeals and complaints in many of the information commissions (see table VI chapter 5) can also be traced to the non-imposition of penalties, for there is little fear among the PIOs that if they delay, or ignore, or illegitimately refuse an RTI application, then they might get penalised. This results in many unanswered applications, and an equal number of delayed or illegitimately refused ones, resulting in a large number of appeals and complaints to the commission, and thereby the backlog. Therefore, by not imposing even the legally indicated and mandatory penalties, information commissions are increasing their own work-load and encouraging delays and illegitimate denials for the public. In effect, this one almost universal violation by information commissions is threatening the very viability of the information regime in India.

Discussions with some information commissions seem to suggest that the consequences of their not imposing penalties has not been fully appreciated. There seems to be a belief that at best the imposition of penalties will only affect the cases that come before the IC, and as these comprise less than 5% of the total RTI applications received, the impact on the RTI regime would be negligible.

What the ICs do not seem to appreciate is that only about 45% of the applications are successful in getting the information that they asked for, and less than a third of these in getting the information within the legally prescribed time limit¹³⁸. The fact that less than 10% of those not receiving the asked for information reach the IC suggests that perhaps only the better educated, the better off, and those with time to spare, get there. Barring a few exceptions, most the poor and oppressed segments of society, for whom very often the RTI application was a last resort to access some critically needed basic entitlement, give up when even this last resort does not work.

Why is it that over half of the RTI applications do not succeed? One reason is that the PIO has no incentive to make even a minimal effort to process an application and take the trouble of responding. The PIO knows that less than 10% of the applicants whose applications were either denied or ignored would move the commission in an appeal. The PIO also knows that even if the IC allows every appeal, which never happens, the PIO would have to respond to only 10% of the applications that were originally received, saving the PIO a huge amount of work and effort. Besides, as things stand, many commissions take months, even years, to settle appeals and there is a chance that a new PIO might have taken over by then.

The RTI Act foresaw the possibility of such an approach by PIOs and therefore prescribed a mandatory penalty for delay, for non-response, and for illegitimate denial of information. However, the data analysed for this study shows that in only 1.3% of the cases where penalty was legally imposable, was penalty actually imposed by the IC (Chapter 5(g) of this report). Therefore, the probability of a PIO being penalised is too low to be an effective deterrent to ignoring or illegitimately refusing RTI applications.

However, if a penalty was imposed each time an RTI application was ignored or illegitimately denied, as is legally required, then there would hardly be an application that would be delayed, ignored, illegitimately denied, or otherwise illegally dealt with. Therefore, the mandatory imposition of penalties, as laid down in the law, would most likely change the whole incentive base of PIOs and significantly tilt the balance in favour of the public and of transparency.

g) Agenda for action

- i. There needs to be a serious discussion among the ICs to resolve once and for all their hesitation at imposing penalties, as envisaged in the law. Every order must contain a finding on whether there

¹³⁸ P 70, table 6(g), chapter 6, RaaG & CES, 2014, *Op. cit.*

was any violation of the Act and the subsequent course of action adopted by the IC (See box 17 for suggested format).

- ii. Meanwhile, considering that penalties imposed on the PIOs, apart from ensuring that PIOs have an incentive to act in accordance with the law, also contribute revenue to the public exchequer, perhaps it is time that the Supreme Court was petitioned. An order from the SC directing that all ICs must strictly follow the provisions of the RTI law regarding the imposition of penalties and that, where they were in violation, they would risk prosecution under relevant sections of the Indian Penal Code for wilfully causing a loss to the exchequer. One section that could be invoked is section 218 of the Indian Penal Code. Provisions of the Prevention of Corruption Act could also become applicable here.
- iii. The SC could also be petitioned to hold that commissioners who were not willing to function in accordance with the provisions of the RTI Act should be liable to be removed, as per section 14(1) and 17(1), as an unwillingness to work in conformity with the law could well be described as misbehaviour, or incapacity, or both.
- iv. Applicants and complainants must persistently pursue the issue of imposition of penalty where any violation of the RTI Act has taken place. They must insist that the ICs detail in each order the reasons why penalty was not being imposed.

BOX 17

The issues to be covered in an IC order adjudicating on an appeal or complaint, if that order is to be fully compliant with section 20(1) of the RTI Act (Also see Box 1 in chapter 1)

1. Ask and answer the question whether there has been any violation of the RTI Act in the matter being considered, specifically:

- i. Refusal to receive an application
- ii. Delay in furnishing information
- iii. Denial of part/full information such that it was subsequently allowed
- iv. Provision of incorrect information
- v. Provision of incomplete information
- vi. Provision of misleading information
- vii. Destruction of information which was the subject of any request
- viii. Obstruction in any manner to the furnishing of information (eg. delay in responding, refusal to provide in the form asked for, refusal to forward to appropriate PA, refusal to collect from other officers in PA and forward, etc.), with details

Note: Each of these would have to be asked and answered, as specified in section 20(1), **whether there is or there is not** a specific complaint or mention made by the appellant or complainant.

2. Wherever the answer is “yes” or “maybe” to any one or more of the violations listed above, the IC would have to assume that the PIO is liable to be penalized, and issue a show cause notice asking the PIO to explain why she or he should not be penalized, as per section 20(1).

3. Based on the response of the PIO, the IC would have to give detailed reasons to hold that either:

- a) The violation that was thought to have occurred did not actually occur, as deduced from the explanation/information/records provided by the PIO as a part of the response to, and hearing on, the show cause notice; or
- b) That though the violation did take place, the PIO is not liable to be penalised as, based on the response to, and discussion of, the show cause notice, there was
 - a. reasonable cause for refusal to receive an application
 - b. reasonable cause for delay in supplying information
 - c. bonafide reasons for denying the request for information;Or that the PIO
 - d. Unknowingly gave incorrect information
 - e. Unknowingly gave incomplete information
 - f. Unknowingly gave misleading information.

4. Alternatively, the IC would have to impose penalty and give detailed reasoning on the quantum of penalty imposed.

5. Is the PIO persistently violating the RTI Act? If so, IC would have to recommend disciplinary action (S. 20(2)).

Note: As matters come before the IC after the mandated period for supply of information is over, usually 30 days, in each case unless the PIO had responded within 30 days legitimately refusing the asked for information, or establishes a reasonable cause for delay, the PIO would in every case be liable for the imposition of penalty relating to delay.

PART VI. SCOPE AND COVERAGE OF THE RTI ACT

29. Supremacy of the RTI Act [S. 22]

Section 22 of the RTI Act:

“22. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

Major Issues

One of the major issues that needed adjudication was the effort by public authorities to assert the pre-eminence of other laws and legal instruments over the RTI Act, despite section 22. The supremacy of one law over all others is not easy for people to accept or internalise. This is especially so when people working in a particular sector consider their sector and the statutes governing it very critical, and treat the RTI Act as a less-critical general law. Often amazement, and even indignation, is expressed at being told that their long-standing statutes must give way to the newly arrived RTI Act.

There was also dispute over what was meant by “inconsistent”. Public authorities on occasion chose to believe that if the existing laws and rules laid down a different procedure for achieving a similar outcome, then these existing procedures must be given precedence, despite section 22, even though there might be discrepancies between them. For example, if the fee prescribed differed, or the time frames differed, or even what was accessible and to whom was at variance, there was an effort to pass this off as not being “inconsistent” and therefore not attracting section 22 of the RTI Act.

The third type of debate that has emerged is around the contention that certain institutions, especially judicial institutions, do not get covered by section 22, and therefore their rules and procedures prevail over the RTI Act.

a) Pre-eminence of the RTI Act and rules over other laws and rules

A typical example of PAs questioning the statutory provision mandating that the RTI Act would prevail over all other inconsistent laws was the stand taken by the Reserve Bank of India before the Supreme Court, in **SC RBI 2015**. Therein, the RBI argued that the RTI Act was a general statute while the banking laws were specific laws, and as such general laws could not override specific statutes. They also argued that later laws could not override older laws, unless the older laws had been repealed. This was despite the fact that when the Parliament wanted the RTI Act not to be applicable to a later law (Collection of Statistics Act, 2008), they specifically put in a provision in the later act, to this effect. Thankfully, the Supreme Court rejected both these contentions.

The SC specifically rejected the contention of the RBI that the RTI was a general act and therefore could not override the RBI Act, which was a specific law. The SC also held that the RTI Act overrules all other acts, including the RBI Act or the Banking Regulation Act, in so far as access to information is concerned. Thereby, the SC rejected the contention that the RBI Act, being an earlier act, overrode the RTI Act.

“43. The submission of the RBI that exceptions be carved out of the RTI Act regime in order to accommodate provisions of RBI Act and Banking Regulation Act is clearly misconceived. RTI Act, 2005 contains a clear provision (Section 22) by virtue of which it overrides all other Acts including Official Secrets Act. Thus, notwithstanding anything to the contrary

contained in any other law like RBI Act or Banking Regulation Act, the RTI Act, 2005 shall prevail insofar as transparency and access to information is concerned. Moreover, the RTI Act 2005, being a later law, specifically brought in to usher transparency and to transform the way official business is conducted, would have to override all earlier practices and laws in order to achieve its objective. The only exceptions to access to information are contained in RTI Act itself in Section 8.”

Further, in **SC CBSE 2011**, the SC clearly and unequivocally held that where there was a conflict between the RTI Act and any other law or instrument (including rules and regulations), the RTI Act would prevail, as specified in section 22 of the RTI Act.

The SC was faced with the question of whether examinees can access copies of their own corrected answer sheets from the Central Board of Secondary Education (CBSE), even though the rules of the CBSE prohibit such access. It was argued that in an earlier order the SC had held that re-evaluation of scripts, as it is banned under the rules of MBSE, cannot be allowed. The SC had then held that if there was no “superior statutory right”, then the rules of the organization would prevail.

As section 22 of the RTI Act specified that the provisions of the RTI Act would prevail, wherever there was a conflict between them and any other law, the information asked for would have to be provided, unless it was exempt under the RTI Act.

“17...As a consequence if an examination is governed only by the rules and regulations of the examining body which bar inspection, disclosure or re-evaluation, the examinee will be entitled only for re-totalling by checking whether all the answers have been evaluated and further checking whether there is no mistake in totaling of marks for each question and marks have been transferred correctly to the title (abstract) page. The position may however be different, if there is a superior statutory right entitling the examinee, as a citizen to seek access to the answer books, as information.

“18.....Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/ rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of section 8(1) of RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/ bye-laws of the examining body governing the examinations.”

In **HC-RAJ Alka Matoria 2012**, the Rajasthan High Court made it very clear that not only the RTI Act, but rules formulated under the RTI Act, took precedence over all other acts and rules respectively, as laid down in section 22.

“18. As noticed, per Section 22, the Act of 2005 has an overriding effect over any other law; and as a necessary corollary, the rules framed thereunder for the purpose of giving effect to its provisions shall have overriding effect in the field they operate and are supposed to operate. The field in question i.e., the "fee payable" for the purpose of making application under Sec. 6 and for the purpose of providing information under Sec. 7 is the one which is governed by the rules under Sec. 27 of the Act of 2005. Any rule or regulation framed by the respondent-University, to the extent standing at contradiction to such rules cannot be regarded as valid.”

Similarly, in **HC-DEL Union of India Vs. Col. V.K. Shad 2012**, the Delhi High Court reiterated that the RTI Act overrode the Army Rules or DoPT instructions, if there was a conflict between them.

“16.3 As indicated above, notes on files and opinions, to my mind, fall within the ambit of the provisions of the RTI Act. The possessor of information being a public authority, i.e., the Indian Army it could only deny the information, to the seeker of information who are respondents in the present case, only if the information sought falls within the exceptions provided in Section 8 of the RTI Act; in the instant case protection is claimed under clause (1)(e) of Section 8. Therefore, the argument of the petitioners that the information can be denied under Army Rule, 184 or the DoPT instructions dated 23.06.2009 are completely untenable in view of the overriding effect of the provisions of the RTI Act. Both the Rule and

the DoPT instructions have to give way to the provisions of Section 22 of the RTI Act. The reason being that, they were in existence when the RTI Act was enacted by the Parliament and the legislature is presumed to have knowledge of existing legislation including subordinate legislation. The Rule and the instruction can, in this case, at best have the flavour of a subordinate legislation. The said subordinate legislation cannot be taken recourse to, in my opinion to nullify the provisions of the RTI Act.

Despite this, in several instances ICs have upheld the contention of the PIO that the information seeker should use the mechanism and rules adopted by the PA to access information, rather than accessing it under the RTI Act. This is a clear violation of section 22 of the RTI Act and of the various judicial orders discussed above.

In a 2013 order, the CIC held that where there is a procedure laid down by the Supreme Court rules, citizens cannot get information from the SC under the RTI Act:

“... the Appellant had sought certain information regarding some pending case before the Supreme Court of India. The CPIO had repeatedly informed him that he could get any such information only by going through the procedure laid down by the Supreme Court in its Order XII under the Supreme Court Rules 1966... In view of this clear provision for providing such information to the public, the CIC has continuously held that the citizens cannot get this information under RTI. It should not be forgotten that the provisions of the Right to Information (RTI) Act do not automatically override the provisions of all other laws and rules made there under; as provided in section 22 of the RTI Act, the latter would override the provisions of other laws and rules made there under only if there is anything inconsistent in those... we would like to advise the Appellant to approach the Supreme Court Registry for whatever information he wants about this particular case by following the laid down procedure.” (CIC/ 000038 dated 08.07.2013)

In another case, an appellant sought copies of answer sheets under RTI Act. The CIC upheld the order of the PIO and directed that University rules in the matter be followed:

“Suffice to say that he was offered copies of the evaluated answer-scripts by following the procedure prescribed by the University but he did not avail of this opportunity. In the premises, I am constrained to close the matter.” (CIC/ 000470 dated 10.05.2013)

An RTI application was filed to know details of star (*) serial number currency notes. The PIO cited 8(1)(a) to deny information citing adverse impact on economic interests and how it might lead to incitement of offence. Interestingly, PIO went on to cite that disclosure would violate provisions of the Official Secrets Act (OSA). The IC upheld the decision of the PIO and did not record any adverse remarks against the PIO for invoking OSA, even though Section 22 clearly states that the provisions of the RTI Act override the provisions of the OSA (*CIC/000343 dated 07.04.2015*).

b) Applicability of section 22 to all public authorities

The RTI Act is applicable to the whole of India (except Jammu and Kashmir), and to all public authorities in its entirety, except those security and intelligence organisations specifically exempted under section 24 of the RTI Act. Nevertheless, despite a Karnataka IC order to the contrary, the Karnataka High Court (*HC-KAR KIC 2009*) held that¹³⁹:

- i) If a Karnataka High Court document is published then a citizen cannot ask for a copy of the document under the RTI Act, and even if the document is not in stock in the market, the citizen needs to approach the publisher but cannot get a copy under the RTI Act from the public authority holding that document in its records.

¹³⁹ This becomes all the more significant as there is a tendency to hold that courts are exempt from some other provisions of the RTI Act, for example section 4(4) of the RTI Act relating to the provision of information in local language (see chapter 4, section (e)(ii) of this report); section 28 of the RTI Act relating to the formulation of rules (see chapter 4, section (c) of this report).

- ii) If a document can be accessed under a rule or regulation of the Karnataka High Court that is holding that document, then a citizen cannot access it under the RTI Act, but only under the rules of the concerned PA.
- iii) If the order of the IC was implemented then it would lead to “illegal demands”.

The Karnataka High Court seemed to suggest, though not categorically state, that section 22 was not applicable at least to the high courts.

This order became widely known because the Supreme Court quoted extensively from it, in **SC Karnataka IC 2013**, while dealing with the issue of whether an information commission (or, for that matter, an information commissioner) can move the division bench of a high court against an order of a single judge of a high court, setting aside an order of the IC. Though, admittedly, the SC did not affirm or reject the HC’s order, the fact that the SC quoted it without explicitly stating that it was not expressing a view on the question, seems to have been interpreted differently by at least some ICs and PIOs, who quote this SC order while denying information under the RTI Act, if it can be accessed under existing PA rules or regulations, or if it is available in published form.

If the SC had not wanted to take up the substantive issue of whether the applicant could legitimately access the asked for information under the RTI Act, perhaps it need not have quoted the portion of the HC order that dealt with this question or, at the very least, stated that it was not expressing a view on the questions raised. The relevant portion of the SC order, quoting the HC order, is reproduced below:

“Respondent No.1 challenged the aforesaid order in Writ Petition No.9418/2008. The learned Single Judge allowed the same and quashed the order of the Commission by making the following observations:

“The information as sought for by the respondent in respect of Item Nos. 1, 3 and 4 mentioned above are available in Karnataka High Court Act and Rules made thereunder. The said Act and Rules are available in market. If not available, the respondent has to obtain copies of the same from the publishers. It is not open for the respondent to ask for copies of the same from the petitioner. But strangely, the Karnataka Information Commission has directed the petitioner to furnish the copies of the Karnataka High Court Act & Rules free of cost under Right to Information Act. The impugned order in respect of the same is illegal and arbitrary.

The information in respect of Item Nos.6 to 17 is relating to Writ Petition No.26657/2004 and Writ Petition No. 17935/2006. The respondent is a party to the said proceedings. Thus, according to the Rules of the High Court, it is open for the respondent to file an application for certified copies of the order sheet or the relevant documents for obtaining the same. (See Chapter-17 of Karnataka High Court Rules, 1959). As it is open for the respondent to obtain certified copies of the order sheet pending as well as the disposed of matters, the State Chief Information Commissioner is not justified in directing the petitioner to furnish copies of the same free of costs. If the order of the State Chief Information Commissioner is to be implemented, then, it will lead to illegal demands. Under the Rules, any person who is party or not a party to the proceedings can obtain the orders of the High Court as per the procedure prescribed in the Rules mentioned supra. The State Chief Information Commissioner has passed the order without applying his mind to the relevant Rules of the High Court. The State Chief Information Commissioner should have adverted to the High Court Rules before proceeding further. Since the impugned order is illegal and arbitrary, the same is liable to be quashed. Accordingly, the following order is made.”” (SC Karnataka IC 2013)

Though the specific HC order refers to documents sought from the Karnataka High Court, it has also been misunderstood to rule that the restrictions placed on access of information from high courts is applicable to all public authorities. This is because the High Court has neither restricted the scope of its orders to itself, nor indicated any precondition unique to high courts, that would have made it clear that the order did not apply to other PAs.

Unfortunately, despite the exhortation of the SC to give detailed reasoning for their orders (see chapter 1(a) for details), the HC did not give any reasons why the three stands that they had taken, summarised above, legally followed from the RTI Act or from any other act that was applicable to the matter.

Nowhere in the RTI Act is it specified that copies of published material cannot be accessed by citizens under the RTI Act. In fact, section 7(9) of the RTI Act specifies that “*information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.*” Also, section 9 of the RTI Act does empower the PIO to reject requests for information that “*would involve an infringement of copyright subsisting in a person other than the State*”. Presumably even if the documents sought were copyrighted, the copyright would vest with the High Court, which would be within the definition of State. Also, section 9, in allowing without qualification access to documents whose copyright vests with the State, has surely indicated that published documents can also be accessed under the RTI Act.

And if the ban of published documents being provided under the RTI Act has been decreed under a provision of some other law, then it was incumbent upon the HC to both mention the law and specific provision and show how section 22 of the RTI Act does not trump it.

Clearly providing a print-out or photocopy of the rules would not have disproportionately diverted the resources of the HC, nor threatened the safety of the rules. And if in the opinion of the HC it would have, then this needed to be stated and reasons given thereof.

Given the fact that the said rules are available on the website of the High Court, perhaps the correct response, in keeping with the RTI Act, would have been for the PIO to have indicated to the applicant the web address where it was available, and at the same time offered to provide a print out or photocopy, on the payment of the prescribed per page charge, as every Indian citizen does not have easy access to the internet, and in any case section 7(9), quoted above, gives them an option to access information in the form that they want it.

The second proposition, that if information can be accessed under the rules of a PA it cannot be accessed under the RTI Act, is equally problematic. First, there is nothing in the RTI Act which even vaguely implies that. Also, the HC has given reference to no other law which lays this down. Therefore, the common understanding would be that if there are two or more ways of accessing information, then it is the choice of the applicant to decide which way to adopt. In fact, in many cases the applicant might not even be aware of other rules, or the various departmental rules under which the information can also be accessible.

Further, in this specific case, the rules of the Karnataka HC, and some other HCs, have conditions for disclosure and requirement for applicants that are not there under the RTI Act. For example, the Karnataka HC rules specify that:

“(2) Persons who are not parties to the proceeding may be granted such copies only if the Registrar on being satisfied about the sufficiency and bona fides of the grounds or reasons on which the applicant requires copies, directs that such copies be furnished: 1 [Provided that such verification by the Registrar is not necessary when the application is for certified copies of Judgements and orders in any proceedings before the High Court and the applicant seeking certified copy furnished his full address]”. They also go on to say that “(2) Application for certified copies, made by persons who are not parties to the proceeding should be accompanied by affidavits specifying grounds or reasons on which the copies are required and stating how the applicants are interested in obtaining the copies” (Chapter XVII of Karnataka HC Rules)¹⁴⁰.

Surely, as these restrictions and requirements are not there under the RTI Act and are in fact inconsistent with its provisions, the RTI Act will prevail, as section 22 of the RTI Act will apply.

¹⁴⁰ **Extracts from** “The High Court of Karnataka Rules, 1959” pages 53 and 55, accessed on 31 May, 2016, from: [http://dpal.kar.nic.in/Kanunu%20padakosha%20PDF%20Files/HighcourtR/HC\(K\)Rules.pdf](http://dpal.kar.nic.in/Kanunu%20padakosha%20PDF%20Files/HighcourtR/HC(K)Rules.pdf)

Finally, the contention that if the order of the IC was implemented then it would lead to illegal demands could only have one interpretation, that it would lead to demands that were not in conformity with the rules of the Karnataka HC. However, in so far as there were inconsistencies between these rules and the RTI Act, and given section 22 of the RTI Act, following the Karnataka HC rules would be the one that would result in illegalities.

There are various examples of IC orders that have been based on such a misunderstanding of section 22 of the RTI Act. In an RTI matter, the PIO denied copies of orders passed by the Madras High Court citing that such information could be obtained by way of filing an application under Order XII Rule 3 of the Appellate Side Rules of the Madras High Court. The IC while upholding the contention, in its order recorded:

“However, in numerous decisions, the CIC has already held that the citizens cannot access judicial records of the Supreme Court of India or the High Courts under RTI; they would have to get such records by following the rules framed by the Courts. In the Karnataka Information Case, the Supreme Court has also held a similar view. . . The Appellant has been rightly advised to follow the procedure prescribed under the Appellate Side Rules of the Madras High Court in order to get the copies of the orders listed by him. However, if the Madras High Court Right to Information Rules expressly provided for disclosure of even judicial records under RTI, the CPIO cannot deny it to any citizen. Therefore, we direct the CPIO to reconsider this case and disclose the information under RTI within 10 working days of receiving this order only if the Madras High Court Right to Information Rules have an express provision for such disclosure. If there is no such provision, he is not required to provide the copies of any such orders.” (CIC/000564 dated 5.4.2013).

Also, here the IC appears to hold that only if the Madras HC rules specifically provide for information to be disclosed under the RTI Act, can it be done. This is without a legal basis, as the RTI Act is applicable to all PAs, except for those specifically exempt, and there is no legal provision for PAs to “opt in” or “opt out” of the RTI Act, as the IC seems to be suggesting in the order.

Rather than hypothesising, the IC should have directed the PIO to produce a copy of the rules and pursued them to arrive at a conclusive finding. And if the IC found that the rules were *ultra vires* of the RTI Act, should have directed the PA, using its powers under section 19(8), to appropriately amend them.

In another matter, the appellant had sought copies of orders passed by the SC in 9 cases. The PIO denied the information because the information could be accessed from the website, or from various law journals. The PIO also advised the appellant to get the required certified copies of all such orders by following the procedure laid down in the Supreme Court Rules 1966, and by paying the fees prescribed in these rules. The IC agreed with the denial of information, and held:

“In several such cases, we have already held that the citizens must access certified copies of judicial records including the orders passed by the Supreme Court by following the procedure laid down under the Supreme Court rules and not under RTI. The provisions of the Right to Information (RTI) Act do not override all existing laws and rules. As clearly stated in section 22, the provisions of the RTI Act would override all other laws in force only if there is anything inconsistent in those. Since the disclosure of information is the common objective in both the Supreme Court rules as also the Right to Information (RTI) Act, the latter cannot override the former. Recently, in the Karnataka CIC case, the Supreme Court has ruled in favour of this position.” (CIC/001737 dated 26.4.2013).

In this case again, the IC seems to be misinformed that the SC has upheld any such position. As discussed, the SC did not arrive at any finding in the matter, as it was dismissed on other, technical, grounds.

Even more puzzling is the stand of the IC that as the overall objective is provision of information, then there is no conflict between the RTI act and the SC rules. This would suggest that any rule made by any PA, which might for example charge a thousand rupees per page and restrict access to only specific people, as long as it claims that its objective is disclosure of information, would not be in conflict with the RTI Act. Clearly an indefensible position with horrific implications.

c) *Agenda for action*

- i. A detailed public discussion among legal experts, RTI activists, officials, and members of parliament is required on the scope and applicability of section 22 of the RTI Act, especially in light of the additional threat where certain new laws have an inherent disclaimer that the RTI Act will not apply to them in whole or part, (eg. The Collection of Statistics Act, 2008, specifically section 9 read with section 32). The Parliament must reconsider the tendency of giving birth to a whole host of “transparency proof” legislations.
- ii. Additionally, ICs and PAs need to be updated on the implications of the various judicial orders that reiterate the supremacy of the RTI Act over all laws and especially over existing institutional rules and procedures. The DoPT should issue an OM informing all ICs and Central Government PAs, and state governments, accordingly.
- iii. All HCs must review their RTI rules and ensure that these are not inconsistent with, or go beyond, the RTI Act. They should be in keeping with the order of the Supreme Court in the ***SC RBI 2016***.

30. Organisations excluded from the ambit of the RTI Act [S. 24]

Section 24 of the RTI Act:

“24. (1) Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government:

“Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:”

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“(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.”

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(4) Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify:”

“Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:”

Major Issues

The need to have a section like section 24 in the RTI Act was fiercely debated while the RTI bill was being publicly discussed. Global best practices mandated that exclusions from disclosure must be justified by real harm. *Opening Government: A Guide to Best Practice in Transparency, Accountability and Civic Engagement Across the Public Sector*, put together by the Transparency and Accountability Initiative, captures global thinking and includes in its best practice for transparency laws the following exceptions to transparency:

“Exceptions to the right of access protect interests, which are recognised as legitimate under international standards, and are subject to a test of a risk of actual harm and a mandatory public interest override. Partial access shall be provided for.”¹⁴¹

Clearly, exempting entire organisations from the purview of the RTI Act violates the test of “risk of actual harm”, especially when stringent exemptions already exist in the RTI Act, excluding all information whose disclosure risks actual harm. So, for example, section 8(1)(a) specifically exempts from disclosure any “information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;”. Further, sections 8(1)(d), (g), (h) & (j) collectively cover all other possible risks of actual harm by exempting:

“(d) which would harm the competitive position of a third party;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

¹⁴¹http://www.law-democracy.org/wp-content/uploads/2010/07/Open-Government-Initiative.Full_Jul11.pdf Page 77. Last accessed on 11th August 2016.

(b) information which would impede the process of investigation or apprehension or prosecution of offenders;

(j) Information which...would cause unwarranted invasion of the privacy of the individual”

It is difficult to imagine any other eventuality not already covered under these exemptions, and yet organisations vie to be exempt under section 24. The only explanation seems to be that this has become a prestige issue and the ability of an organization to be listed as exempt somehow establishes its importance, its power, and its influence over others.

The fact that these organisations are still answerable, when there are allegations of either corruption or human rights violation, to some extent minimizes the potential damage that section 24 could inflict on the transparency regime.

Also, which organization is eligible to be declared exempt under section 24 has been a contentious issue. Understandably, even more contentious has been the determination of what qualifies to be an allegation of corruption or human rights violation, thereby obligating even an exempt organization to respond to a request for information. Another problem that is sometimes observed is that departments, that have a part exempted under section 24, often attribute all sensitive information to this part, thereby thwarting attempts to access them under the RTI Act.

a) Determining eligibility for exemption

Soon after the RTI Act came into force, there was controversy over whether the armed forces, specifically the Army, the Navy and the Air Force, were exempt under the RTI Act. Though, the notification issued by the Government of India did not list them, reportedly the then Chief of Army Staff issued an order so ordaining. Luckily, this was subsequently withdrawn, quickly and quietly. Inexplicably, some paramilitary organisations, like the Border Security Force, the Central Reserve Police Force, the Indo-Tibetan Border Police, the Central Industrial Security Force, the Assam Rifles, and the Special Service Bureau were exempted.¹⁴²

It was argued that the armed forces were as much intelligence and security organisations as these paramilitary forces were, if not more. Therefore, if the paramilitary forces were exempt under the RTI Act, why were the armed forces also not exempt? But, as discussed earlier, perhaps the issue here was the competitiveness between “civilian” and “military” groups, and clearly the civilians wielded more political clout. Nevertheless, it is still not evident why any of these organisations need to be exempted from being covered by the RTI Act, especially as all legitimate secrets are adequately protected by the existing exemptions, even for organisations that are fully under the RTI Act.

The controversy over the exemption of organisations under section 24, which had died out after the initial outrage, erupted again when the government decided to include the Central Bureau of Investigation (CBI) among the excluded organisations.

The CBI was initially set up in 1941 by the British (as the Special Police Establishment)¹⁴³ to investigate and prosecute cases of corruption. Till today, that is one of its main tasks, though now it also dabbles in other criminal cases, either when directed to do so by the central government, or by a court of law. In 2011,

¹⁴² For details, see the links listed below, all last accessed on 6 Dec. 2016:
http://www.indianexpress.com/full_story.php?content_id=83053 and
http://www.indianexpress.com/full_story.php?content_id=83060. Also
http://www.indianexpress.com/full_story.php?content_id=83116

¹⁴³ <https://www.google.co.uk/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=history+of+central+bureau+of+investigation>

the Government of India, exercising its powers under section 24(1) of the RTI Act, notified it as being exempt under the RTI Act¹⁴⁴. This was questioned in the Madras High Court.

In ***HC-MAD S. Vijayalakshmi 2011***, the issue was whether the CBI can be treated as an intelligence and security organisation and exempted under section 24(1), especially as all sensitive information was already exempt from disclosure under section 8(1). The HC held that there was a vital difference between an organisation being exempt, as under section 24(1), and specific information being exempt, as under section 8(1). For the CBI, the exemptions under section 8 were not adequate because:

"21... the Second Schedule enumerated Intelligence and Security Organisations being Organisations established by the Central Government. The exemption under Section 24(1) was with regard to the organisations themselves and also with regard to any information furnished by such organisations to the Government. Therefore, there is a vital distinction between the exemption from disclosure of information contemplated under Section 8(1) of the Act to that of the exemption of the organisation themselves and the information furnished by them to the Government under Section 24(1) of the Act. Therefore, these two provisions are exclusive of each other and one cannot substitute for the other. Therefore, we are not persuaded to accept the submission of the Learned Counsel for the Petitioner that in view of the exemptions contemplated under Section 8(1) of the RTI Act there would be no necessity for a blanket exemption under Section 24(1) of the Act. This contention, in our view, is wholly misconceived."

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"35. Indisputably, CBI is dealing with so many cases of larger public interest and the disclosure of information shall have great impact not only within the country but abroad also, and it will jeopardise its works. Equally, the investigations done by CBI have a major impact on the political and economic life of the nation. There are sensitive cases being handled by the CBI which have direct nexus with the security of the nation. Once jurisdiction is conferred upon the CBI under Section - 3 of the Act by notification made by the Central Government, the power of investigation should be governed by the statutory provisions, and cannot be interfered with or stopped or curtailed by any executive instructions, and shall not be subjected to any executive control."

However, the HC gave no reasons as to why they thought there was a "vital distinction". Further, the HC went on to say that the CBI performed both security and intelligence roles. But by the definition used by the HC, most of government performs both such roles, especially state police departments, vigilance departments, home departments, finance departments, and many more. Therefore, by this logic most of government should be exempt.

The HC also did not give reasons why all the concerns they had were not adequately addressed by sec 8(1), except for again hinting at some "vital distinction", as mentioned earlier, without elaborating. But what is the advantage of being exempt? Admittedly they are exempt from proactive disclosures under section 4(1), and do not have to provide general information about their administration, though at least one HC order questions this (***HC-P&H First Appellate Authority Vs. Chief Information Commissioner 2011***, discussed later). The additional protection that organisations get by being exempt under section 24(1), over and above what is provided by section 8(1) to organisations within the purview of the RTI Act, is that organisations exempt under section 24(1) are not subject to the public interest exception of section 8(2). But surely public interest must be the final arbiter of all secrecy. And, in keeping with international best practices, "real harm", rather than "blanket bans", should be the preferred strategy for exemptions.

In any case, organisations like the Central Bureau of Investigation, which deal extensively with allegations of corruption, would find it of little use to be gazetted under section 24(1), as much of their work would involve allegations of corruption and they would have to again seek exemption, where justified, under 8(1)(h) or other clauses of section 8(1).

¹⁴⁴ <http://indianexpress.com/article/india/india-others/cbi-sought-part-rti-exemption-govt-gave-it-full/>

The real justification for 24(1), as discussed during the formulation of the RTI bill, was that there were organisations like the Research and Analysis Wing (RAW) and the Intelligence Bureau (IB) who, in gathering external and internal intelligence respectively have sometimes to operate “under” or “outside” the law, and carry out clandestine operations. Therefore, though it is common knowledge that “informers” within and outside the country, for example, are given financial and other “incentives” to reveal information useful for the security of India, you cannot always justify such actions in a strict legal sense.

Of course, the exemptions already provided under section 8(1), especially clauses (a) and (g), would adequately cover such situations. But, in any case, the CBI is not authorised or intended to carry out such clandestine operations.¹⁴⁵

b) Defining allegations of corruption and human rights violation

Despite a clear provision in section 24(1) & (4) that even exempt organisations must respond to requests for information relating to allegations of corruption and human rights violation, exempt PAs have questioned this and tried to raise objections. In ***HC-MAD Superintendent of Police 2011***, the Madras High Court reiterated that even for organisations exempt under section 24(4) of the RTI Act, information regarding allegations of corruption and human rights violation was not exempt.

“15... The relevant portion of the G.O. Ms. No. 158 dated 26.8.2008, reads as under:

“”3. The State Vigilance Commission and the Directorate of Vigilance and Anti-Corruption primarily deal with investigation into alleged corrupt activities of public servants. The investigations and subsequent actions culminate in disciplinary action or criminal action in the appropriate courts of law. Confidentiality and secrecy in certain cases requires to be maintained during the whole process from the initial stage up to filing of charge sheet in the court on the one hand and up to issue of final orders in the case of disciplinary proceedings. Revealing any information to any agency including the aggrieved person would be detrimental to the progress of the case. Of late, there has been a tendency on the part of some citizens to ask for a lot of information under the Right to Information Act, 2005. The Government feel that in vigilance cases giving information at the initial stages, investigation stages and even prosecution stages would lead to unnecessary embarrassment and will definitely hamper due process on investigation.””

“16. The validity of the said Government Order was questioned before this Court in W.P. No. 4907 of 2009 (P. Pugalenthi v. State of Tamil Nadu represented by the Secretary to Government, Personnel and Administrative Reforms (N) Department, Chennai and others) and the same has been upheld by order dated 30.3.2009. The contention of the learned Special Government Pleader is that in view of the above, the Chief Information Commissioner should not have directed the furnishing of information required by each of the first Respondent in the appeals and consequently the learned Judge should not have dismissed the writ petitions filed by the department. In our opinion, the said contention is totally unacceptable. Even in the said judgment, the Division Bench has categorically held that in the event the information required by an applicant relates to the allegations of corruption, the said Government Order cannot be made applicable and accordingly the department cannot claim the exemption from furnishing those particulars relating to corruption. The learned Judge has correctly applied the above judgment with reference to the particulars required by each of the first Respondent in these appeals, as they relate only to corruption.

17. In terms of Section 24(4), the State Government is empowered to notify in the Official Gazette that nothing contained in the Right to Information Act shall apply to such intelligence and security organization being organizations established by the State Government. Nevertheless, in the light of the first proviso, such power being conferred on the State Government to notify exempting such intelligence and security organizations, it cannot notify in respect of the information pertaining to the allegations of corruption and human rights violations. As a necessary corollary, the power to exempt from the provisions of the Act is not available to the State Government even in case of intelligence and security organizations in respect of the

¹⁴⁵ For role of CBI, see: <http://www.cbi.gov.in/aboutus/cbiroles.php>

information pertaining to the allegations of corruption and human rights violations. The application of the notification depends upon the nature of information required. In this context, we may refer that the first Respondent in W.A. No. 321 of 2010 has sought for the particulars As all these particulars would certainly relate to corruption, the Government Order has no application to the facts of this case.”

In **HC-P&H First Appellate Authority-cum-Additional Director General of Police 2011**, the Punjab and Haryana High Court reiterated that the term “allegation of corruption” must be understood in a wide sense, and included information relating to public appointments.

“15. As mentioned above, the expression pertaining to allegation of corruption cannot be exhaustively defined. The Act is to step-in-aid to establish the society governed by law in which corruption has no place. The Act envisages a transparent public office. Therefore, even in organizations which are exempt from the provisions of the Act, in terms of the notification issued under Section 24(4) of the Act, still information which relates to corruption or the information which excludes the allegation of corruption would be relevant information and cannot be denied for the reasons that the organization is exempted under the Act.

16. The information sought in the present case is in respect of the number of vacancies which have fallen to the share of the specified category and whether such posts have been filled up from amongst the eligible candidates. If such information is disclosed, it will lead to transparent administration which is antithesis of corruption. If organization has nothing to hide or to cover a corrupt practice, the information should be made available. The information sought may help in dispelling favouritism, nepotism or arbitrariness. Such information is necessary for establishing the transparent administration. Therefore, we do not find any illegality in the order passed by the State Information Commissioner, Haryana and affirmed by learned single Judge in the orders impugned in the present appeals.”

Interestingly, in **HC-P&H First Appellate Authority Vs. Chief Information Commissioner 2011**, the Punjab and Haryana High Court held that the exclusion provided under 24 to an organisation was only related to matters dealing with security and intelligence, and not to other matters.

“7. What is not disputed here is that the notification (Annexure P-7) was issued under Section 24(4) of the Act, which postulates that nothing contained in this Act shall apply to such intelligence and security organization being organization established by the State Government as that Government may from time to time by notification in the official gazette specify.

8. Proviso to this section posits that the information pertaining to the allegation of corruption and human right violation shall not be excluded under the Sub-section. The words "Such Intelligence" and "Security" in this section are of great considerable significance in this context.

9. A co-joint reading of these provisions would escalate, only that information is exempted which is directly co-related and relatable to intelligence and security of the State and not otherwise. Moreover, the information sought by Respondent No. 2 pertains to the allegations of corruption and against those persons who have grabbed and illegally constructed building on the Government land and action taken against them on the complaint of the complaint. Such information pertaining to allegation of corruption and human rights violations are not otherwise covered under the exemption clause as urged on behalf of Petitioners.”

c) No retrospective effect

The state government of Manipur apparently issued a notification declaring certain organisations to be exempt from the purview of the RTI Act, by using the powers vested with the state government under section 24(4). However, there seemed to have been an effort to apply this exemption retrospectively so that information already asked for before the notification was issued could also consequently be denied. The Supreme Court held, in **SC CIC Manipur 2011**, that such a notification cannot have a retrospective effect.

“45. However, one aspect is still required to be clarified. This Court makes it clear that the notification dated 15.10.2005 which has been brought on record by the learned counsel for the respondent vide I.A. No.1 of 2011 has been perused by

the Court. By virtue of the said notification issued under Section 24 of the Act, the Government of Manipur has notified the exemption of certain organizations of the State Government from the purview of the said Act.

“This Court makes it clear that those notifications cannot apply retrospectively. Apart from that the same exemption does not cover allegations of corruption and human right violations. The right of the respondents to get the information in question must be decided on the basis of the law as it stood on the date when the request was made. Such right cannot be defeated on the basis of a notification if issued subsequently to time when the controversy about the right to get information is pending before the Court. Section 24 of the Act does not have any retrospective operation. Therefore, no notification issued in exercise of the power under Section 24 can be given retrospective effect and especially so in view of the object and purpose of the Act which has an inherent human right content.”

d) Agenda for action

- i. The Parliament should debate whether it is really necessary to have section 24 as a part of the RTI Act, especially as it is unlikely that the government can give even a single example of any information that security and intelligence agencies hold, and that ought not to be disclosed, which is not already exempt under one or more of the provisions of section 8(1).
- ii. The other option could be to specifically list just the intelligence bureau and the Research and Analysis Wing as exempt organisations and let any other aspirant establish that they hold information that needs to be protected from disclosure and yet is not exempt under one or more of the existing sections of the RTI Act.
- iii. Adjudicators, especially ICs must take into consideration that the courts have held that allegations of corruption and human rights violation are to be understood in their broadest sense. The DoPT should bring this order to the attention of all ICs and all central and state PAs.

ANNEXURES

1. Profile of the research team

Co-ordinators

Amrita Johri (Ms.) has been working with Satark Nagrik Sangathan since 2007 and is a member of the working committee of the National Campaign for Peoples' Right to Information (NCPRI). She has co-authored various reports and articles on issues of transparency, accountability and grievance redress in India. She did her Masters in Social Policy from the London School of Economics.

Anjali Bhardwaj (Ms.) is a co-convenor of the National Campaign for Peoples' Right to Information (NCPRI). She is a founding member of Satark Nagrik Sangathan and is associated with the Right to Food Campaign in India. She has authored various reports and articles on issues of transparency and accountability. She holds an MSc degree from the University of Oxford.

Shekhar Singh (Mr.) is founder member and former convenor of the National Campaign for People's Right to Information (NCPRI). He has taught philosophy at St. Stephen's College, University of Delhi, and at the North Eastern Hill University, Shillong; and ethics and administration, and environmental management, at the Indian Institute of Public Administration, New Delhi. He has authored and edited various publications on environmental management and on the right to information.

Consultants

Bincy Thomas (Ms.) has been associated with RTI Assessment and Analysis Group (RaaG), India. She had been involved in a diagnostic study on 'Citizen's access to information in South Asia' carried out by The Asia Foundation. As a Short Term Consultant with the World Bank, she has also carried out proactive disclosure assessments. Previously, she has worked in the field of Right to Education. She holds a degree in social work from Christ University, Bangalore.

Misha Bordoloi Singh (Ms.) studied history at St Stephen's College, Museum & Artefact Studies at Durham University, UK, and Anthropology at the London School of Economics. She spent almost ten years working on issues of transparency and accountability in India. She is presently a Senior Policy Officer at the UK's Information Commissioner's Office.

Partha S. Mudgil (Mr.) is a lawyer practising in London. He graduated with a BA in History from St. Stephen's College, Delhi, and an LLB from the University of Cambridge, UK. He has extensive experience advising financial institutions, global corporations and non-profit organisations. He also works on issues of transparency and right to information.

Prashant Sharma (Dr.) is a Visiting Fellow at the United Nations Research Institute for Social Development (UNRISD), Geneva and a Research Fellow at the Swiss Graduate School of Public Administration (IDHEAP), University of Lausanne.

Dr. Sharma holds a PhD from the London School of Economics and Political Science (LSE) in which he examined the political and social processes that led to the enactment of the Right to Information Act in India. He also has degrees from the School of Oriental and African Studies (SOAS), University of London, Jamia Millia Islamia University, New Delhi, and St. Stephen's College, University of Delhi.

A recent Global Fellow of the Open Society Foundations, New York, he has previously worked with the International Centre for Integrated Mountain Development (ICIMOD), the World Bank, the BBC World Service Trust, the London School of Economics, and the University of Delhi among others. His publications include *Democracy and Transparency in the Indian State: The Making of the Right to Information Act* (Routledge, London and New York 2014); and the co-edited volume *Transparent Governance in South Asia* (Indian Institute of Public Administration, New Delhi 2011).

Shibani Ghosh (Ms.) is an Advocate-on-Record, Supreme Court of India, and a Fellow at the Centre for Policy Research, New Delhi. She specialises in environmental and access to information laws. At CPR, she researches on issues relating to domestic environmental law and regulation. She has been a Sustainability Science Fellow at the Harvard Kennedy School (2014-2015), and a visiting faculty at the TERI University and the RICS School of Built Environment, where she taught environmental law.

Shibani was a legal consultant to the Central Information Commission, a quasi-judicial body set up under the Right to Information Act, 2005 in 2009-2010. In 2011, she was awarded the first DoPT-RTI fellowship by the Department of Personnel and Training, Government of India to undertake research on the implementation of the Right to Information Act 2005. She has also been associated with the Legal Initiative for Forest and Environment (LIFE), a New Delhi-based environmental law firm. She is a Rhodes Scholar and holds both a master's in science in environmental change and management and a bachelor's in civil law (a graduate degree in law) from the University of Oxford. She has an undergraduate degree in law from the National University of Juridical Sciences, Kolkata.

Research Associates

Astha Tandon (Ms.) holds a Master's Degree in Human Rights and Duties Education from Jamia Milia Islamia university, currently working as a Research Associate at . She has been working with RaaG since 2013 as a research associate. Her responsibilities included filing RTI applications and appeals , analysis of RTI applications and responses, compiling, collating and analyzing data for a report on adherence of the RTI Law by the NGOs and questioning their substantial funding issue. In 2013-14 she worked on "People's Monitoring RTI Regime in India" where responsibilities included filing RTI applications and appeals , analyzing applications, and compiling, collating and analyzing data for a report on the rules laid down by the nodal agencies of different states in India. Also, as a part of the study she was involved in conducting Field Work of the RTI applicant interview in Jaipur, Rajasthan, Web Analysis of Public authorities in the sample and Information commissions for their proactive disclosure and maintaining website of the organisation. She has also worked as a STT for World Bank in 2013-14 on "Empowerment through Information - TAG and RIB publication" where responsibilities included analyzing RTI applications and maintaining TAG website.

Sharu Priya (Ms.) is an advocate by profession with a background in Political Science. She pursued a degree in Political Science from Lady Shri Ram College, DU, later pursuing a second degree in LLB from Campus Law Centre, Faculty of Law, DU. She has been passionately involved with different verticals of the RTI Act, starting with a role as a research associate at the Central Information Commission (CIC) for a period of one year. Following her second degree in LLB, her next stint was at the High Court where she practiced for a brief period before joining the NGO Raag. Post Raag, her next calling was as an Intellectual Property Rights (IPR) Consultant at CPA Global, a corporate IPR Management and Technology firm. Her current role sees her come back to the place she got her start from, her present posting is as a Legal Consultant in the CIC.

Vikas Prakash Joshi (Mr.) is a journalist, writer, research professional, translator and freelance model. He holds a Bachelors' degree in English Literature from Symbiosis College of Arts and Commerce, postgraduate diploma in journalism from the Asian College of Journalism Chennai and an MA in Development Studies from Tata Institute of Social Sciences.

After his MA he completed the translation of a Marathi book on the movement for Vidarbha, likely to be the first of its kind before joining the Right to Information Assessment and Advocacy Group as a Consultant. At present he is working on his first and second books. In addition, he is a freelance model and is launching Pune's first podcast on literature and translation in Marathi tentatively titled 'Literary Gupshup'.

He started writing letters to the editor in major English newspapers at the age of 16 before he became a columnist at the age of 18, writing a weekly column for children called 'Reflections' and a regular contributor of short stories in the 'Young Buzz' a children's supplement in the Maharashtra Herald. His essay 'The World's Youngest Democracy' got the first prize in a global essay competition in 2012 where it was chosen as first out of 97 entries from all over the world.

Research Assistants

Aastha Maggu (Ms.) was a student of Political Science at Miranda House, University of Delhi. Currently she is a Post Graduate student of Public Policy at National Law School of India University, Bangalore. She is keen on pursuing her interest in increasing government accountability after this course.

Rohit Kumar (Mr.) is a 5th year B.A.LL.B Student in School of Law, KIIT University, Bhubaneswar. He has been extensively working on Right to Information for the last five years and has filed more than 200 RTI applications till date, encompassing multiple issues in different departments of the Governments. He has formerly interned with Mazdoor Kisan Shakti Sangthan, School for Democracy, NCPRI and advocate Prashant Bhushan in the Supreme Court of India.

2. List of court cases cited in the report

With detailed citations and web-links

a) Supreme Court

No.	As cited in the text (in alphabetical order)	Detailed citations	web links
1.	SC Bihar PSC 2012	Bihar Public Service Commission Versus Saiyed Hussain Abbas Rizwi Civil Appeal No. 9052 of 2012	goo.gl/BlgJK9
2.	SC CBSE 2011	Central Board of Secondary Education Versus Civil Appeal No.6454	goo.gl/44z8yD
3.	SC Central Public Information officer 2010	Central Public Information Officer Versus Subhash Chandra Agrawal Civil Appeal No. 10044 of 2010	goo.gl/8R5VVR
4.	SC Central Public Information Officer 2016	Central Public Information Officer Versus Subhash Chandra Agrawal Civil Appeal No. 10044 of 2010 dated 17/8/2016	goo.gl/39bqQh
5.	SC Centre for PIL 2011	Centre for PIL Versus Union of India Writ Petition (C) No. 348 of 2010	goo.gl/iwhNXc
6.	SC Centre for Public Interest Litigation, 2015	Centre For Public Interest Litigation V/S Registrar General Of The High Court Of Delhi, Decided On July 26, 2016. Writ Petition (C) Nos. 514 Of 2015 & 712 Of 2015.	goo.gl/yQ2ewf
7.	SC CIC Manipur 2011	Chief Information Commissioner versus State of Manipur and Another CIVIL APPEAL Nos.10787-10788 of 2011	goo.gl/9KYiI1
8.	SC Commodore Lokesh K. Batra (Retd.) 2016	Commodore Lokesh K. Batra (Retd.) Versus The Registrar, Supreme Court of India And Ors. SLP No. 3978/2016	goo.gl/JUXDmV
9.	SC Extra Judicial Execution Victim Families Association 2016	Extra Judicial Execution Victim Families Association (EEVFAM) & Anr.Petitioners versus Union of India & Anr.Respondents Writ Petition (Criminal) No.129 Of 2012	goo.gl/z28Dzq
10.	SC Girish Ramchandra 2012	Girish Ramchandra Deshpande Versus Cen. Information Commr. & Ors. Special Leave Petition (Civil) No. 27734 of 2012	https://goo.gl/u7kJud
11.	SC ICAI 2011	The Institute of Chartered Accountants of India Versus Shaunak H.Saty & Ors CIVIL APPEAL NO. 7571 OF 2011 [Arising out of SLP (C) No.2040/2011]	goo.gl/eizUqX
12.	SC Karnataka IC 2013	Karnataka Information Commissioner Versus State Public Information Officer & Anr Petition(s) for Special Leave to Appeal (Civil)...../2013 CC 1853/2013	goo.gl/VgmMjB
13.	SC Khanapuram 2010	Khanapuram Gandaiah Versus Administrative Officer & Ors Special Leave Petition (Civil) NO.34868 OF 2009	goo.gl/v3WV8F
14.	SC KPSC 2016	<i>Kerala Public Service Commission & Ors Versus The State Information Commission & Anr CIVIL APPEAL Nos.823-854 OF 2016</i>	goo.gl/Qciji
15.	SC Manohar 2012	Manohar s/o Manikrao Anchule Versus State of Maharashtra & Anr CIVIL APPEAL NO. 9095 OF 2012	goo.gl/wi10e3
16.	SC Namit Sharma 2012	Namit Sharma Versus Union of India Writ Petition (Civil) NO. 210 of 201	goo.gl/33gtQ3
17.	SC PUCL 2003	People's Union Of Civil Liberties (P.U.C.L.) & Anr. Vs. Union Of India & Anr. 13/03/2003 Writ Petition (Civil) 490 Of 2002, Writ Petition (Civil) 509 Of 2002, Writ Petition (Civil) 515 Of 2002	goo.gl/WWK1M7

18.	SC RBI 2015	Reserve Bank of India Versus Jayantilal N. Mistry Transferred Case (Civil) No. 91 Of 2015	goo.gl/AfQG1h
19.	SC Reliance Petrochemicals 1988	Reliance Petrochemicals Ltd. Vs. Respondent: Proprietors Of Indian Express Newspapers, Bombay Pvt. Ltd. On 23 September, 1988 Equivalent Citations: 1989 Air 190, 1988 Scr Supl. (3) 212	goo.gl/le0Odn
20.	SC RK Jain 2013	R.K.Jain Versus Union Of India & Anr Civil Appeal No. Of 2013 (arising out of SLP (C) No.22609 of 2012)	goo.gl/uFICuO
21.	SC S.P.Gupta 1982	S.P. Gupta vs President Of India And Ors. on 30 December, 1981 Equivalent citations: AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365	https://goo.gl/8rjVui
22.	SC Sakiri Vasu 2007	Sakiri Vasu v State of Uttar Pradesh and Ors. AIR 2008 SC 907 : 2008 AIR SCW 309 : (2008)2 SCC 409	https://goo.gl/oGNWmT
23.	SC Sub divisional officer Konch 2000	Sub divisional officer Konch versus Maharaj Singh Equivalent citations: (2003) III LJ 1080 SC, (2003) 9 SCC 191	goo.gl/lbsfSr
24.	SC Subhash Chandra Agarwal 2015	Subhash Chandra Agarwal Versus Registrar, Supreme Court Of India And Ors. Special Leave to Appeal No. 15291/2015	goo.gl/OEYQFg
25.	SC Sudhana Lodh 2003	Sudhana Lodh versus National Insurance Company Ltd. Civil Appeal No. 557 of 2003	goo.gl/5gNRJL
26.	SC Supreme Court Advocates-on-Record Association 2015	Supreme Court Advocates-on-Record Association and Ors. Vs. Respondent: Union of India (UOI) Writ Petition (Civil) No. 13 of 2015	https://goo.gl/5TXHSi
27.	SC Thalappalam 2013	Thalappalam Ser. Coop. Bank Ltd Versus State of Kerala CIVIL APPEAL NO. 9017 OF 2013	goo.gl/7Wbvyc
28.	SC The State of Uttar Pradesh 1975	State Of U.P vs Raj Narain & Ors on 24 January, 1975 Equivalent citations: 1975 AIR 865, 1975 SCR (3) 333	https://goo.gl/KggUAK
29.	SC TSR Subramanian 2013	T.S.R. Subramanian Versus Union of India Writ Petition (Civil) No.82 of 2011	goo.gl/9ersdC
30.	SC Union of India v. Association for Democratic Reforms, 2002	Union Of India V. Association For Democratic Reforms (2002) 5 Sc 294	goo.gl/jMcZwp
31.	SC UoI vs Namit Sharma 2013	UOI Versus Namit Sharma Review Petition (C) No. 2309 of 2012	goo.gl/5EiQz0
32.	SC UoI vs S. Srinivasan 2012	Appellants: Union of India (UOI) and Ors. Vs. Respondent: S. Srinivasan Civil Appeal No. 3185 of 2005	https://goo.gl/CiWDzP
33.	SC UPSC 2013	Union Public Service Commission Versus Gourhari Kamila CIVIL APPEAL NO. 6362 OF 2013	goo.gl/PmFm4qf

b) High Courts

No.	As cited in the text (in alphabetical order)	High Court	Detailed citation	Web link
1.	<i>HC – ALL Alok Mishra 2012</i>	Allahabad	Alok Mishra Versus Central Information Commission and Others Civil Misc. Writ Petition No. 53889 of 2012	http://goo.gl/ljQVtX
2.	<i>HC – AP Divakar S. Natarajan 2009</i>	Andhra Pradesh	Divakar S. Natarajan Versus State Information Commissioner Writ Petition No. 20182 of 2008	goo.gl/qrHoQ8
3.	<i>HC – AP Dr. A. Sudhakar Reddy 2009</i>	Andhra Pradesh	Dr. A. Sudhakar Reddy Versus The A.P. State Information Commission Writ Petition No. 3207 of 2009	http://goo.gl/N3K5OL
4.	<i>HC – AP O.M. Debara 2014</i>	Andhra Pradesh	O.M. Debara Versus The A.P. State Information Commission Writ Petition No. 3258 of 2008	goo.gl/nrSvWN
5.	<i>HC – AP PIO 2011</i>	Andhra Pradesh	Public Information Officer Versus Central Information Commission Writ Petition No. 28785 of 2011	http://goo.gl/HnnezK
6.	<i>HC – BOM Kashinath Shetye 2012</i>	Bombay	Kashinath Shetye Versus Public Information Officer & Ors. Writ Petition No. 325 of 2009	goo.gl/7910nF
7.	<i>HC – BOM Dr. Celsa Pinto 2007</i>	Bombay	Dr. Celsa Pinto versus The Goa State Information Equivalent citations: 2008 (110) Bom L R 1238	goo.gl/IUJ4zL
8.	<i>HC – BOM Kausa Educational and Charitable Trust 2013</i>	Bombay	Kausa Education & Charitable Trust & Ors. Versus Maharashtra State Information Commission Writ Petition No. 3650 of 2012	goo.gl/YfMA4x
9.	<i>HC – BOM Mahendra 2013</i>	Bombay	Mahendra Versus The State Information Commissioner Writ Petition No. 2173 of 2013	goo.gl/aorWKN
10.	<i>HC – BOM Nirmala institute of education 2012</i>	Bombay	The Principal Nirmala Institute of Education Versus State of Goa Writ Petition No. 345 of 2006	http://goo.gl/tQEu3r
11.	<i>HC – BOM PIO 2011</i>	Bombay	Public Information Officer Versus Shri. Manohar Parrikar Leader of Opposition Writ Petition No. 478 of 2008 and Writ Petition No. 237 of 2011	goo.gl/U2xNTs

12.	HC – BOM Rajeshwar Majoor Kamgari Sahakari Sanstha Limited 2011	Bombay	Rajeshwar Majoor Kamgari Versus State Information Commissioner Writ Petition No. 1256 of 2011	http://goo.gl/5SjtGU
13.	HC - BOM SEBI 2015	Bombay	Securities and Exchange Board of India Versus Arun Kumar Agrawal Writ Petition (L) No. 3386 of 2014	http://goo.gl/UwVoNt
14.	HC – BOM Shahada Taluka 2013	Bombay	Shahada Taluka Co-operative Education Society Versus Shri Kalyan Sajan Patil and State of Maharashtra Writ Petition No. 715 of 2013	goo.gl/lcjXMO
15.	HC – BOM Shonkh Technology International Ltd. 2011	Bombay	Shonkh Technology International Ltd. Versus State Information Commission Maharashtra and others Writ Petition Nos. 2912 and 3137 of 2011	goo.gl/autSiD
16.	HC - BOM SIC, Nagpur Bench & Othrs. 2012	Bombay	The State Information Commissioner Versus Mr. Tushar Dhananjay Mandlekar Letters Patent Appeal No. 276/2012 in Writ Petition No. 3818/2010 (D)	goo.gl/QwxRSu
17.	HC – CHH Kewal Singh Gautam 2011	Chhattisgarh	Kewal Singh Gautam Versus State of Chhattisgarh W.P. No. (C) 5843 of 2009	http://goo.gl/HWYIAC
18.	HC – DEL Ankur Mutreja 2012	Delhi	Ankur Mutreja Versus Delhi University LPA 764/2011	https://indiankanoon.org/doc/16873969/
19.	HC – DEL Army Welfare Housing Organisation 2013	Delhi	Army Welfare Housing Organisation Versus Adjutant Generals Branch W.P. (C) 5567/2013	https://indiankanoon.org/doc/43654432/
20.	HC – DEL Ajay Madhusudan Marathe 2013	Delhi	Ajay Madhusudan Marathe Versus Sanjukta Ray W.P. (C) 1464/2013	goo.gl/iEtQTQ
21.	HC – DEL BS Mathur 2011	Delhi	B.S. Mathur Versus Public Information Officer W.P. (C) 295 and 608/2011	goo.gl/CbndjB
22.	HC – DEL Central Information Commission 2011	Delhi	Central Information Commission Versus Department of Posts L.P.A. 782/2010	goo.gl/AjlfU9
23.	HC – DEL Damodar Valley Corporation 2012	Delhi	Damodar Valley Corpn Versus Modh Rafique Ansari LPA 288 of 2011	https://indiankanoon.org/doc/11764591/
24.	HC – DEL Delhi Integrated Multi Model Transit System Ltd 2012	Delhi	Delhi Integrated Multi Model Transit System Ltd. Versus Rakesh Aggarwal W.P. (C) 2380/2010	https://indiankanoon.org/doc/48920981/
25.	HC – DEL Delhi metro RC Ltd. 2011	Delhi	Delhi Metro Rail Corporation Ltd. Versus Sudhir Vohra LPA No. 145/2011	https://indiankanoon.org/doc/1302206/

26.	<i>HC – DEL Dr. Neelam Bhalla 2014</i>	Delhi	Dr. Neelam Bhalla Versus Union of India W.P. (C) 83/2014	https://indiankanoon.org/doc/93780359/
27.	<i>HC - DEL Harish Kumar 2012</i>	Delhi	Harish Kumar Versus Provost Marshal-Cum-Appellate Authority LPA. No. 253/2012	https://indiankanoon.org/doc/144795012/
28.	<i>HC – DEL IIT 2011</i>	Delhi	Indian Institute of Technology Versus Navin Talwar W.P. (C) 747 of 2011	https://indiankanoon.org/doc/198689996/
29.	<i>HC – DEL Jamia Millia 2011</i>	Delhi	Jamia Millia Islamia Versus Sh. Ikramuddin W.P.(C.) No. 5677/2011	https://indiankanoon.org/doc/121725/
30.	<i>HC – DEL Joginder Pal Gulati 2013</i>	Delhi	Joginder Pal Gulati Versus The Officer on Special Duty W.P.(C) 6773/2011	http://goo.gl/Nmzt0N
31.	<i>HC – DEL JP Agrawal 2011</i>	Delhi	J.P. Agrawal Versus Union of India W.P. (C) 7232/2009	https://indiankanoon.org/doc/104466988/
32.	<i>HC – DEL Maniram Sharma 2015</i>	Delhi	Maniram Sharma Versus Central Information Commission W.P. (C) 8041/201	https://indiankanoon.org/doc/19135532/
33.	<i>HC – DEL Ministry of Railways 2014</i>	Delhi	Ministry of Railways Versus Girish Mittal W.P.(C) 6088/2014 and CM Nos. 14799 and 14800/2014	https://indiankanoon.org/doc/139893269/
34.	<i>HC – DEL Parmod Kumar Gupta 2013</i>	Delhi	Parmod Kumar Gupta Versus Public Information Officer W.P. (C) 973/2008	http://goo.gl/w86yiV
35.	<i>HC – DEL Prem Lata 2012</i>	Delhi	Prem Lata Versus Central Information Commission W.P. (C) 2458 of 2012	https://indiankanoon.org/doc/95949069/
36.	<i>HC – DEL President's Secretariat 2012</i>	Delhi	President's Secretariat Versus Nitish Kumar Tripathi W.P.(C) 3382/2012	https://indiankanoon.org/doc/56774592/
37.	<i>HC – DEL State Bank of India 2013</i>	Delhi	State Bank of India Versus Md. Shahjahan W.P. (C) 9057/2011	https://indiankanoon.org/doc/144505791/
38.	<i>HC – DEL Telecom 2013</i>	Delhi	Telecom Regulatory Authority of India Versus Yash Pal W.P.(C) 2794/2012	https://indiankanoon.org/doc/60231703/
39.	<i>HC – DEL THDC 2013</i>	Delhi	THDC India Limited Versus Smt. T. Chandra Biswas WP (C) No. 2506/2010	https://indiankanoon.org/doc/123760630/
40.	<i>HC – DEL THDC 2014</i>	Delhi	THDC India Ltd. Versus R.K. Raturi W.P. (C) 903/2013	https://indiankanoon.org/doc/60028388/
41.	<i>HC – DEL Union of India through Ministry of External Affairs 2013</i>	Delhi	Union of India through Ministry of External Affairs Versus Rajesh Bhatia W.P.(C) 2232/2012, W.P.(C) 8932/2011	https://indiankanoon.org/doc/19790383/
42.	<i>HC – DEL Union of India Vs. Vishwas Bhamburkar 2013</i>	Delhi	Union of India Versus Vishwas Bhamburkar W.P. (C) 3660/2012	goo.gl/Ht29Wd

43.	<i>HC – DEL UoI vs. PK Jain 2013</i>	Delhi	Union of India Versus Pramod Kumar Jain WP. (C) No. 14069 of 2009	https://indiankanoon.org/doc/129212600/
44.	<i>HC – DEL UPSC 2011</i>	Delhi	Union Public Service Commission Versus N Sugathan LPA Nos. 797, 802, 803 and 810/2011	https://indiankanoon.org/doc/64678149/
45.	<i>HC – GUJ Chandravadan Dhruv 2013</i>	Gujarat	Chandravadan Dhruv Versus State of Gujarat Special Civil Application No. 2398 of 2013	https://indiankanoon.org/doc/141917565/
46.	<i>HC – HP Jitender Bhardwaj 2012</i>	Himachal Pradesh	Jitender Bhardwaj Versus Kamal Thakur and Others Civil Writ Petition No. 9757 of 2012-F	goo.gl/dtzLg7
47.	<i>HC – HP Sanjay Hindwan 2012</i>	Himachal Pradesh	Sanjay Hindwan Versus State Information Commission and Others Civil Writ Petition No. 640 of 2012-D	http://goo.gl/VqX04q
48.	<i>HC – HP State Bank of India 2014</i>	Himachal Pradesh	State Bank of India Versus The Central Information Commission CWPs Nos. 6675, 6676, 6677, 6678, 6679, 6680, 6681, 6682, 6683 & 6824 of 2013	http://goo.gl/22oq0W
49.	<i>HC – HP Ved Prakash 2013</i>	Himachal Pradesh	Ved Prakash Versus State Information Commissioner CWP No. 8794 of 2011-J	http://goo.gl/xRKJxo
50.	<i>HC – KAR Mario 2013</i>	Karnataka	Sri Mario Pires Versus The Karnataka State Information Commission Writ Petition No. 193/2013 (GM-RES)	https://indiankanoon.org/doc/6934438/
51.	<i>HC – KAR SR Narayanmurthy 2015</i>	Karnataka	S.R. Narayanamurthy Versus Poornapragna House Building Co-operative Society Writ Appeal Nos. 2652, 3006 and 3007 of 2009 (GM Res)	http://goo.gl/ulfzPr
52.	<i>HC – KER K. Natrajan 2014</i>	Kerala	K. Natarajan Versus State of Kerala W.A. No. 871 of 2013	https://indiankanoon.org/doc/58835350/
53.	<i>HC – KER Mulloor Co-operative Society Ltd. 2012</i>	Kerala	Mulloor Rural Co-operative Society Ltd. Versus State of Kerala and others W.A. No. 1688 of 2009	http://goo.gl/k6NkvB
54.	<i>HC – MAD Amirthanguru 2013</i>	Madras	N. Amirthaguru Versus The Deputy General Manager W.P.No.35392 of 2012	https://indiankanoon.org/doc/94981440/
55.	<i>HC - MAD M.Velayutham Vs. The registrar TNIC</i>	Madras	M.Velayutham Versus The Registrar W.P.NOs.8068 and 8069 of 2008	https://indiankanoon.org/doc/1546858/

56.	<i>HC – MAD Registrar General, High Court of Madras vs. K. Elango 2013</i>	Madras	The Registrar General, High Court of Madras Versus K. Elango and The Registrar, The Tamil Nadu Information Commission W.P. No. 20485 of 2012 and M.P. No. 1 of 2012	https://indiankanoon.org/doc/79815961/
57.	<i>HC – MAD Registrar Thiyagarajar College of Engineering 2013</i>	Madras	The Registrar, Thiyagarajar College of Engineering Versus The Registrar, Tamil Nadu Information Commission W.P. No. 1253 of 2010	https://indiankanoon.org/doc/87499527/
58.	<i>HC – MAD S. Vijayalakshmi 2011</i>	Madras	S. Vijayalakshmi Versus Union of India W.P. No. 14788 of 2011 and M.P. No. 1 of 2011	https://indiankanoon.org/doc/173422957/
59.	<i>HC – MAD Superintendent of Police 2011</i>	Madras	The Superintendent of Police Versus R. Karthikeyan W.A. No. 320 of 2010	https://indiankanoon.org/doc/822176/
60.	<i>HC – MAD The Public Information Officer vs. Central Information Commission 2014</i>	Madras	The Public Information Officer, The Registrar, High Court Versus The Central Information Commission Writ Petition No. 19314/2012 (GM-RES)	http://goo.gl/7rqowr
61.	<i>HC – MAD The Registrar General vs. R.M. Subramanian 2013</i>	Madras	The Registrar General Versus R.M. Subramanian and The Registrar Writ Petition No. 19314/2012 (GM-RES)	https://indiankanoon.org/doc/149874576/
62.	<i>HC - MEG Belma Mawrie 2015</i>	Meghalaya	Belma Mawrie Versus Chief Information Commission WP(C) No. 49/2015	goo.gl/5l2J37
63.	<i>HC – ORI North Eastern Electricity Supply Company of Orissa Ltd 2009</i>	Orissa	North Eastern Electricity Supply Company of Orissa Ltd. Versus State of Orissa W.P. (C) NO.17178 OF 2011	goo.gl/OxdC7I
64.	<i>HC – ORI Public Information Officer 2009</i>	Orissa	Public Information Officer Versus Orissa Information Commission Equivalent Citation: AIR2010Ori74	http://goo.gl/nJwgJM
65.	<i>HC – P&H First Appellate Authority-cum-Additional Director General of Police 2011</i>	Punjab and Haryana	First Appellate Authority-cum-Additional Director General of Police & Anr. Versus Chief Information Commissioner LPA Nos. 744 & 745 of 2011	https://indiankanoon.org/doc/179324348/
66.	<i>HC – P&H Chandigarh University 2013</i>	Punjab and Haryana	Chandigarh University Versus State of Punjab and Others Civil Writ Petition No. 1509 of 2013	https://indiankanoon.org/doc/160058475/
67.	<i>HC – P&H DP Jangra 2011</i>	Punjab and Haryana	D.P. Jangra Versus State Information Commission and Ors. Civil Writ Petition No. 15964 of 2010 (O and M)	goo.gl/B8b0XX

68.	<i>HC – P&H Dr. MS Malik 2013</i>	Punjab and Haryana	Dr. M.S. Malik Versus Central Information Commission and Others Civil Writ Petition No. 3879 of 2011	https://indiankanoon.org/doc/145693553/
69.	<i>HC – P&H Hindustan Petroleum Corporation Ltd 2011</i>	Punjab and Haryana	Hindustan Petroleum Corporation Ltd. Versus The Central Information Commission and Ors. Civil Writ Petition No. 1338 of 2011	goo.gl/gUqknQ
70.	<i>HC – P&H Munish Kumar Sharma 2014</i>	Punjab and Haryana	Munish Kumar Sharma Versus State of Haryana Civil Writ Petition No. 4340 of 2014	https://indiankanoon.org/doc/167697164/
71.	<i>HC – P&H Satpal Singh 2011</i>	Punjab and Haryana	Satpal Singh Versus State Information Commission, Haryana and Others Civil Writ Petition No. 5246 of 2009	https://indiankanoon.org/doc/53460611/
72.	<i>HC – P&H Ved Prakash 2012</i>	Punjab and Haryana	Ved Parkash and Others Versus State of Haryana and Others Civil Writ Petition No. 10981 of 2012 (O&M)	https://indiankanoon.org/doc/84016171/
73.	<i>HC – P&H Vijay Dheer 2013</i>	Punjab and Haryana	Vijay Dheer Versus State Information Commission, Punjab CWP No. 4239 of 2013 (O&M)	https://indiankanoon.org/doc/171546643/
74.	<i>HC – P&H Vikas Sharma 2014</i>	Punjab and Haryana	Vikas Sharma Versus State of Haryana Civil Writ Petition Nos. 23886 of 2011 and 2201 of 2014	goo.gl/CrAJ1q
75.	<i>HC – P&H Vimal Kumar Setia 2014</i>	Punjab and Haryana	Vimal Kumar Setia Versus State of Punjab CWP No. 18258 of 2008	goo.gl/978wbT
76.	<i>HC – RAJ Alka Matoria 2012</i>	Rajasthan	Alka Matoria Versus Maharaja Ganga Singh University D.B. Civil Writ Petition No. 12471/2012	https://indiankanoon.org/doc/133640019/
77.	<i>HC – RAJ RPSC 2012</i>	Rajasthan	RPSC Versus Jagdish Narain Pandey Civil Writ Petition No. 13740 of 2008	https://indiankanoon.org/doc/29514638/
78.	<i>HC – UTT Bhupendra Kumar Kukreti 2010</i>	Uttarakhand	Bhupendra Kumar Kukreti Versus State of Uttarakhand Writ Petition (M/S) No. 1858 of 2009	goo.gl/k4KEp3
79.	<i>HC – UTT High Court of Uttarakhand 2010</i>	Uttarakhand	High Court of Uttarakhand Versus State Information Commissioner Writ Petition No. 2110 of 2009	goo.gl/GM0MvS
80.	<i>HC – UTT Om Prakash 2011</i>	Uttarakhand	Om Prakash Versus Uttarakhand Information Commission Special Appeal No. 18 of 2011	goo.gl/qRwWh6
81.	<i>HC – UTT State Consumer Disputes Redressal Commission 2010</i>	Uttarakhand	State Consumer Disputes Redressal Commission Versus Uttarakhand State Information Commission SPECIAL APPEAL NO. 62 of 2010	goo.gl/ZSH8m3

82.	<i>HC- BOM 2011 PIO, Raj Bhawan, Goa</i>	Bombay at Goa	Public Information Officer Joint Secretary to the Governor Raj Bhawan, Donapaula, Goa & ORS vs. Shri Manohar Parrikar Leader of Opposition, Goa State Assembly Complex, Porvorim, Bardez, Goa & ORS WP 478 OF 2008	http://goo.gl/XF0dtB
83.	<i>HC-ALL Khurshidur Rahman 2011</i>	Allahabad	Khurshidur Rahman Versus Union of India and Others Civil Misc. Writ Petition No. 20630 of 2011	http://goo.gl/4gAziW
84.	<i>HC-BOM RBI 2011</i>	Bombay	Reserve Bank of India Versus Rui Ferreira and others W.P. Nos. 132 and 307 of 2011	goo.gl/fXQmcz
85.	<i>HC-BOM Vivek Anupam Kulkarni 2015</i>	Bombay	Shri Vivek Anupam Kulkarni Versus The State Of Maharashtra WP NO. 6961 OF 2012	goo.gl/PIVKca
86.	<i>HC-CAL Madhab Kumar Bandhopadhyay 2013</i>	Calcutta	Madhab Kumar Bandhopadhyay Versus The State Chief Information Commissioner W.P. (C) No. 18653(W) of 2009	http://goo.gl/s21RSF
87.	<i>HC-DEL Secretary General, Supreme Court of India 2010</i>	Delhi	Secretary General, Supreme Court of India Vs. Subhash Chandra Agarwal LPA No.501/2009	http://goo.gl/Oub8AD
88.	<i>HC-DEL CPIO, SCI 2009</i>	Delhi	The Cpio, Supreme Court Of India, Versus Subhash Chandra Agarwal & Anr. W.P. (C) 288/2009	http://goo.gl/11jlp3
89.	<i>HC-DEL DDA 2010</i>	Delhi	Delhi Development Authority vs Central Information Commission 2010 WP (C) 12714/2009	http://goo.gl/rQfHmy
90.	<i>HC-DEL Northern Zone Railway Employees Co-Operative Thrift and Credit Society 2012</i>	Delhi	Northern Zone Railway Employees Co-Operative Thrift and Credit Society Versus Central Registrar Cooperative Society W.P.(C) 12210/2009	https://indiankanoon.org/doc/132103251/
91.	<i>HC-DEL Praveen Kumar Jha 2011</i>	Delhi	Praveen Kumar Jha Versus Bhel Educational Management Board And Ors W.P.(C) 5688/2010 and CM No. 11183/2010	http://goo.gl/VNFT7Z
92.	<i>HC-DEL Union of India Vs. Adarsh Sharma 2013</i>	Delhi	Union of India and Ors. Versus Adarsh Sharma W.P. (C) 7453/2011	https://indiankanoon.org/doc/92208095/
93.	<i>HC-DEL Union of India Vs. Col. V.K. Shad 2012</i>	Delhi	Union of India & Ors. Versus Col. V.K. Shad WP (C) 499/2012	https://indiankanoon.org/doc/65728123/
94.	<i>HC-DEL UoI vs Praveen Gupta 2014</i>	Delhi	Union of India Versus Praveen Gupta W.P.(C) 2258/2012	goo.gl/fWkZum
95.	<i>HC-DEL UPSC 2011</i>	Delhi	Union Public Service Commission Vs. N Sugathan LPA Nos. 797, 802, 803 and 810/2011	http://goo.gl/SQaM1C

96.	<i>HC-DEL UPSC vs Angesh Kumar 2012</i>	Delhi	Union Public Service Commission Versus Angesh Kumar & Ors LPA No. 229/2011 and W.P.(C) No. 3316/2011	https://indiankanoon.org/doc/171591060/
97.	<i>HC-GUJ Jagte Raho 2015</i>	Gujarat	Jagte Raho Versus The Chief Minister of Gujarat Writ Petition (P.L.L.) Nos. 143 and 278 of 2014	http://goo.gl/0qPJCL
98.	<i>HC-GUJ Rajendra Vasantlal Shah 2010</i>	Gujarat	Rajendra Vasantlal Shah v. CIC, New Delhi & Others in SLP No. 7538 of 2010, dated 26-11-2010: High Court of Gujarat	http://goo.gl/f8wVdu
99.	<i>HC-GUJ Thakor Sardarji Bhagvanji 2014</i>	Gujarat	Thakor Sardarji Bhagvanji Versus State Of Gujarat LPA No. 1102 of 2014	http://goo.gl/zJpWKP
100.	<i>HC-KAR KIC 2009</i>	Karnataka	SPIO HC of Karnataka Vs. N. Anbarasm WP 9418/2008	http://goo.gl/COJpZ5
101.	<i>HC-KAR Poornaprajna House Building Cooperative Society Ltd 2007</i>	Karnataka	Poornaprajna House Building Cooperative Society Ltd Versus Karnataka Information Commission Equivalent citations: AIR 2007 Kant 136, 2008 (1) KarLJ 672	https://indiankanoon.org/doc/1558339/
102.	<i>HC-MAD Suo-moto review of : The Public Information Officer Vs. The Central Information Commission 2014,</i>	Madras	The Public Information Officer, Registrar Madras High Court Vs. The Central Information Commission & ORS Suo-moto review Application WP No. 258 of 2014	http://goo.gl/Zdklls
103.	<i>HC-P&H Smt. Chander Kanta 2016</i>	Punjab & Haryana	Smt. Chander Kanta Versus The State Information Commission and others CWP No.17758 of 2014	http://goo.gl/9KsHfo
104.	<i>HC-P&H First Appellate Authority Vs. Chief Information Commissioner 2011</i>	Punjab and Haryana	First Appellate Authority and Anr Versus Chief Information Commissioner and Anr. CWP No. 10067 of 2010	http://goo.gl/yn9Als
105.	<i>HC-P&H The Hindu Urban Cooperative Bank Ltd. 2011</i>	Punjab and Haryana	The Hindu Urban Cooperative Bank Ltd. Versus The State Information Commission and Others C.W.P. No. 19224 of 2006 and Other Connected Writ Petitions	https://indiankanoon.org/doc/155741837/
106.	<i>HC-PAT Saiyed Hussain Abbas Rizwi 2011</i>	Bihar	Saiyed Hussain Abbas Rizwi Versus The State Information Commission Letters Patent Appeal No.102 Of 2010	https://indiankanoon.org/doc/139176007/
107.	<i>HC-TRI Dayashis Chakma 2015</i>	Tripura	Dayashis Chakma Versus The State Chief Information Commissioner WP(C) 231 of 2010	http://goo.gl/PIWZZO

3. Format for analysing high court judgements

High Court	
Year	
Case Citation	
Case Reference	
Case Summary	
Total no of petitions	Number of petitions being disposed by the order
PRO	Does the order fully support disclosure of information
PART	Does it partly support disclosure
ANTI	Does it oppose disclosure
ANTI L.	Is the opposition legitimate
Derivative	Does the order derive legal basis from binding legal precedent
Others	
Disagree	Are subsidiary orders relating to penalties etc. in disagreement with the RTI Act
Indeterminate	Order too vague or opaque to allow classification
Petitioner(s)	RTI Applicant/Complainant
	PA
	IC
	FA
	HC
	Third Party
	PIO
	Others
	Central/state govt.
Respondent(s)	RTI Applicant/Complainant
	PA
	IC
	FA
	HC
	Third Party
	PIO
	Central /state Government
	Others
Section(s) of RTI Act involved	
Clustering according to categories of Issues usually raised in HC orders	Definition of information
	Penalty
	RTI Procedure
	Annual confidential report
	Examinations
	Appointments/ Selection
	Appointment of ICs
	Third party
	Definition of PA
	Second schedule/ exempt organisation
	Referred back to IC
	Commercial Confidence
	SIC- a sole member body

	Personal Information
	Misuse of RTI by applicant-as per Court
	Court penalises RTI applicant
	Fiduciary
	Compensation
	IC exceeds its brief- as per Court
	Information sought during investigation
	RTI State Rules
	Review Petition
	Interference in functioning of High Court
	No larger Public interest in relation to information sought- as per Court
	Others
Final clustering	
RTI Act sections	2a
	2e
	2f
	2h
	2j
	4
	5
	6
	7(6)
	7(9)
	8.1.a
	8.1.b
	8.1.d
	8.1.e
	8.1.f
	8.1.g
	8.1.h
	8.1.i
	8.1.j
	8(2)
	8(3)
	9
	10(1)
	11(1)
	12 or 15
	S. 17
	18
	19(1)
	19(4)
	19(5)
	19(8)
	20(1)
	20(2)
	22
	24
	27
	28
	Administrative
	Constitutional
	Others

4. Format for analysing IC orders

	Date of filling in
	Filled in by whom
	Which IC /CIC?
	Name of commissioner (s)
	Name of PA
	Date of RTI application
	Date of response from PIO
	Days Taken by PIO to respond to the application
	Date of First Appeal
	Date of FA decision
	Days taken by FA to respond to First appeal.
	Days taken for FA response from the date of application
	Date of Second Appeal / Complaint
	Date of IC order
	Days taken by IC to respond to SA
	Days taken for IC order from date of filing application
	Order reference number
	Language of order
	Other language
	Order describes information Sought
CASES	Type of case: appeal/complaint/both
APPEALS	Disclosure ordered (full/ part/ none/ others)
APPEALS AND COMPLAINTS	Penalty imposable
	Was penalty imposed?
	Show cause issued?
	Show cause response
	amount of penalty imposable
	amount imposed
	loss to exchequer
	Comments
	Reasoning clear and comprehensive
	Legitimate reasons for denial/other directions
Other elements legitimate	
Nature of illegitimate denials/ rejections/ other directions	
APPEALS – FULL/PART DISCLOSURE, and COMPLAINTS	How much penalty was imposable?
	How much penalty was imposed?
	Loss caused to the exchequer
	Was reasoning clear and comprehensive?
	Comments
	Were other elements of the order legitimate
	comments
Was opportunity given to applicant/complainant to contravene	
APPEALS - PART DISCLOSURE	Were there legitimate reasons for denying part information?
	What reasons/ Comments
APPEALS PART DISCLOSURE Which	2f
	2h
	8(1)(a)
	8(1)(b)

provision(s)/ sections?	8 (1) (c)
	8 (1) (d)
	8 (1) (e)
	8 (1) (f)
	8 (1) (g)
	8(1)(h)
	8(1) (i)
	8(1)(j)
	9
	24
	Others/Provision not mentioned (specify)
	Comments (For example, reasons mentioned but no legal provisions indicated)
	APPEALS NO DISCLOSURE
APPEALS NO DISCLOSURE Which provision(s)/ sections?	What reasons/ Comments
	2f
	2h
	8(1)(a)
	8(1)(b)
	8(1)(c)
	8(1)(d)
	8(1)(e)
	8(1)(f)
	8(1)(g)
	8(1)(h)
	8(1)(i)
	8(1)(j)
	9
24	
APPEALS NO DISCLOSURE	IC believed information had been provided
	Provision not mentioned
	Comments (For example, reasons mentioned but no legal provisions indicated)
	Was penalty imposable?
	Comments
	How much imposable
	Was penalty imposed
	How much imposed
	Loss caused to the exchequer
	Reasoning clear and comprehensive
	Comments
	Other elements legitimate
	comments
	opportunity to contravene
APPEALS OTHER	Legitimate reasons for other directions
	Comments /Reasons
	Reasoning clear and comprehensive
	Comments
	Other elements legitimate
	Comments
	Penalty Imposable
Penalty imposed	

	Loss
	opportunity to contravene
COMPLAINTS	Upheld fully/ partly/ rejected/ other
COMPLAINTS FULLY UPHELD	Was penalty imposable?
	Comments
	How much imposable
	Was penalty imposed
	How much imposed
	Loss caused to the exchequer
	Specific provision(s) mentioned
	Which provision(s)
	Reasoning clear and comprehensive
	Comments
	Other elements legitimate
	comments
	opportunity to contravene
	COMPLAINTS PARTLY UPHELD
What reasons/ Comment	
Was penalty imposable	
Comment	
How much imposable	
Was penalty imposed	
How much imposed	
Loss caused to the exchequer	
Specific provision(s) mentioned	
Which provision	
Reasoning clear and comprehensive	
Comment	
Other elements legitimate	
Comment	
COMPLAINTS REJECTED	opportunity to contravene
	Legitimate reasons to reject complaint and elements other orders
	Comment
	Reasoning clear and comprehensive
	Comment
	Other elements legitimate
	Comment
	Penalty imposable
	Penalty imposed
	Loss
COMPLAINTS OTHERS	opportunity to contravene
	Legitimate reasons for other orders
	Comment
	Reasoning clear and comprehensive
	Comment
	Other elements legitimate
	Comment
	opportunity to contravene
COMMON ILLEGALITIES	Comment
	Were any common illegalities committed
	Denial other than u/s 8 or 9, as specified in s. 7(1)
	cannot be used for yes or no answer. information outside definition of information.

	Ignoring section 2(f) - private parties.
	Refusing to accept certain organisations as public authorities
	Refusing as “too voluminous”
	Refusing provision of reasons and basis of decisions and policies, despite section 4(1) (c) and (d)
	Refusing because not with the PIO/PA, despite section 5(4) and section 6(3)
	why the applicant wants the information or refusing because the grounds are not acceptable, despite s. 6(2).
	Requiring the applicant to inspect the document/ 7(9) to refuse copies of documents
	Not directing the PIO to give details of the fee chargeable and/or asking for exorbitant fee
	Not directing the PIO to give information free after 30 days, despite s. 7(6)
	denial of information just because it is asked for in a particular format, despite S. 7(9)
	denial of the whole document where part exempt, s. 10(1)
	denial because of sub-judice.
	Denial because third party/ notice when not in confidence/denial without sending notice to third party.
	Denial because the applicant did not appear for the hearing
	Not imposing penalty without cause - s. 20(1)
	denying eligibility of intelligence and security agencies, vide s. 24(1)
	Not providing information as available on website – with/without link
	Comment

5. Rules regarding questions in the lower house of Parliament (*Lok Sabha*)

EXTRACT FROM: Rules of Procedure and Conduct of Business in Lok Sabha, Chapter VII

QUESTIONS

Admissibility of questions

(<http://parliamentofindia.nic.in/ls/rules/rulep7.html>)

41. (1) Subject to the provisions of sub-rule (2), a question may be asked for the purpose of obtaining information on a matter of public importance within the special cognizance of the Minister to whom it is addressed.

(2) The right to ask a question is governed by the following conditions, namely:-

*9[(i) it shall be clearly and precisely expressed and shall not be too general incapable of any specific answer or in the nature of a leading question;]

*10[(ii) it shall not bring in any name or statement not strictly necessary to make the question intelligible;

(iii) if it contains a statement the member shall make himself responsible for the accuracy of the statement;

(iv) it shall not contain arguments, inferences, ironical expressions, imputations, epithets or defamatory statements;

(v) it shall not ask for an expression of opinion or the solution of an abstract legal question or of a hypothetical proposition;

(vi) it shall not ask as to the character or conduct of any person except in his official or public capacity;

(vii) it shall not ordinarily exceed 150 words;

(viii) it shall not relate to a matter which is not primarily the concern of the Government of India;

(ix) it shall not ask about proceedings in the Committee which have not been placed before the House by a report from the Committee.

(x) it shall not reflect on the character or conduct of any person whose conduct can only be challenged on a substantive motion;

(xi) it shall not make or imply a charge of a personal character;

(xii) it shall not raise questions of policy too large to be dealt with within the limits of an answer to a question;

(xiii) it shall not repeat in substance questions already answered or to which an answer has been refused;

(xiv) it shall not ask for information on trivial matters;

(xv) it shall not ordinarily ask for information on matters of past history;

(xvi) it shall not ask for information set forth in accessible documents or in ordinary works of reference;

(xvii) it shall not raise matters under the control of bodies or persons not primarily responsible to the Government of India;

(xviii) it shall not ask for information on matter which is under adjudication by a court of law having jurisdiction in any part of India;

(xix) it shall not relate to a matter with which a Minister is not officially*11[concerned];

(xx) it shall not refer discourteously to a friendly foreign country;

*12[(xxi) it shall not seek information about matters which are in their nature secret, such as composition of Cabinet Committees, Cabinet discussions, or advice given to the President in relation to any matter in respect of which there is a constitutional, statutory or conventional obligation not to disclose information;]

(xxii) it shall not ordinarily ask for information on matters which are under consideration of a Parliamentary Committee; and

(xxiii) it shall not ordinarily ask about matters pending before any statutory tribunal or statutory authority performing any judicial or quasijudicial functions or any commission or court of enquiry appointed to enquire into, or investigate, any matter but may refer to matters concerned with procedure or subject or stage of enquiry, if it is not likely to prejudice the consideration of the matter by the tribunal or commission or court of enquiry.]

6. Appeals & complaints received & disposed by ICs

Information on the number of appeals and complaints dealt with by ICs in 2014 & 2015 was accessed from the websites of ICs and from the annual reports compiled by ICs. At times, for different ICs, the information was available for different time-periods- while some ICs provided data for the calendar year, others provided information in terms of the financial year.

Similarly, for 2012 and 2013, though the data was accessed under the RTI Act, yet different ICs provided information for different time periods. The table below provides the raw data as compiled for each IC for 2012-13 & 2014-15. In order to present comparable data, the monthly average was calculated which was then used to estimate the number of appeals and complaints dealt with by the ICs for 2014 & 2015 which is presented in Table IV in chapter 5.

	IC	Received		Disposed		Remarks
		Jan '12 to Nov '13	Jan '14 to Dec '15	Jan '12 to Nov '13	Jan '14 to Dec '15	
1	AP	18,198	NA	15,671	NA	
2	ARU	309	NA	237	NA	
3	ASS	2,466	2,657*	981	156*	*Data pertains to FY '14-'15
4	BIH	26,265*	NA	8,616*	NA	*Data pertains to Dec '12 to Dec '13
5	CHH	2,986*	4,476^	3,067*	2,608^	*Data for the year '12 ^Data for the year '14
6	CIC	62,723*	55,834^	47,662*	40,328^	*Data for FY 11-12 & 12-13 ^Data for FY 13-14 & 14-15
7	Goa	373*	NA	NA	NA	*Data for Jan '12 to Dec '12
8	GUJ	31,884	19,721*	20,657	21,027*	*Data for FY 13-14 & 14-15
9	HAR	10,139	16,641	10,674	16,783	
10	HP	2,341*	713^	2,197*	641^	*Data for FY 11-12 & 12-13 ^Data for FY 13-14
11	JHA	4,748*	NA	2,960*	NA	*Data for Jan '12 to Dec '13
12	KAR	24,155	29,348*	23,617	20,474*	*Data for FY 13-14 & 14-15
13	KER	7,978*	8,288	5,119*	2,352	*Data for FY 11-12 & 12-13
14	MP	8,051	NA	472	NA	
15	MAH	73,968*	47,415^	61,442*	48,426^	*Data for Jan '12 to Dec '13 ^Data for the year '14
16	MAN	NA	NA	NA	NA	
17	MEG	98	109	90	102	
18	MIZ	25	42*	20	42*	*Data for FY 13-14 & 14-15
19	NAG	70	62*	57	62*	*Data for FY 13-14 & 14-15
20	ORI	9,822*	7,621	11,710*	5,030	*Data for Jan '12 to Dec '13
21	PUN	12,733*	14,220	12,538*	13,311	*Data for Jan '12 to Dec '13
22	RAJ	12,865*	13,827	7,505*	13,379	*Data for Jan '12 to Oct '13
23	SIKK	127*	37^	127*	37^	*Data for the year '12 ^Data for the year '14
24	TN	NA	NA	NA	NA	
25	TRI	86	NA	70	NA	
26	UP	62,008*	33,773^	60,875*	40,530^	*Data for Apr '12 to Nov '13 ^Data for the year '15
27	UTT	10,016*	NA^	9,406*	4,415^	*Data for FY 11-12 & 12-13 ^Data for FY 13-14
28	WB	4,938*	2,061^	954*	813^	*Data for Jan '12 to Dec '13 ^Data for the year '14
TOTAL		3,89,372	2,56,845	3,06,724	2,30,516	

7. Extracts from judicial and information commission orders

a) *Extracts from judicial orders discussed in chapter 1*

SC UPSC 2013:

“11. In Aditya Bandopadhyay's case, this Court considered the question whether examining bodies, like, CBSE are entitled to seek exemption under Section 8(1)(e) of the Act. After analysing the provisions of the Act, the Court observed:

““There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-a-vis another partner and an employer vis-a-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(e) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a Director of a company with reference to a shareholder, an executor with reference to a legatee, a Receiver with reference to the parties to a lis an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body. This Court has explained the role of an examining body in regard to the process of holding examination in the context of examining whether it amounts to "service" to a consumer, in Bihar School Examination Board v. Suresh Prasad Sinha MANU/SC/1605/2009 : (2009) 8 SCC 483 in the following manner:

“““11...The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative.

12. When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its 'services' to any candidate. Nor does a student who participates in the examination conducted by the Board, hire or avail of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-a-vis other examinees. The process is not, therefore, availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.

13...The fact that in the course of conduct of the examination, or evaluation of answer scripts, or furnishing of marksheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service provider for a consideration, nor convert the examinee into a consumer....””””

It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer books are evaluated by the examining body. We may next consider whether an examining body would be entitled to claim exemption under Section 8(1) (c) of the RTI Act, even assuming that it is in a fiduciary relationship with the examinee. That section provides that notwithstanding anything contained in the Act, there shall be no obligation to give any citizen information available to a person in his fiduciary relationship. This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself.

One of the duties of the fiduciary is to make thorough disclosure of all the relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer books to anyone else. If A entrusts a document or an article to B to be processed, on completion of processing, B is not expected to give the document or article to anyone else but is bound to give the same to A who entrusted the document or article to B for processing. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer book, Section 8(1)(e) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer book, seeking inspection or disclosure of it. (emphasis supplied)””

12. By applying the ratio of the aforesaid judgment, we hold that the CIC committed a serious illegality by directing the Commission to disclose the information sought by the Respondent, at point Nos. 4 and 5 and the High Court committed an error by approving his order.”

b) Extracts from judicial orders discussed in chapter 2

SC Manohar 2012:

“17. The State Information Commission is performing adjudicatory functions where two parties raise their respective issues to which the State Information Commission is expected to apply its mind and pass an order directing disclosure of the information asked for or declining the same. Either way, it affects the rights of the parties who have raised rival contentions before the Commission. If there were no rival contentions, the matter would rest at the level of the designated Public Information Officer or immediately thereafter. It comes to the State Information Commission only at the appellate stage when rights and contentions require adjudication. The adjudicatory process essentially has to be in consonance with the principles of natural justice, including the doctrine of audi alteram partem. Hearing the parties, application of mind and recording of reasoned decision are the basic elements of natural justice. It is not expected of the Commission to breach any of these principles, particularly when its orders are open to judicial review.

XXX

21. We **may** notice that proviso to Section 20(1) specifically contemplates that before imposing the **penalty** contemplated Under Section 20(1), the Commission **shall** give a reasonable opportunity of being heard to the concerned officer. However, there is no such specific provision in relation to the matters covered Under Section 20(2). Section 20(2) empowers the Central or the State Information Commission, as the case **maybe**, at the time of deciding a complaint or appeal for the reasons stated in that section, to recommend for disciplinary action to be taken against the Central Public Information Officer or the State Public Information Officer, as the case **may** be, under the relevant service rules. Power to recommend disciplinary action is a power exercise of which **may impose** penal consequences. When such a recommendation is received, the disciplinary authority

would conduct the disciplinary proceedings in accordance with law and subject to satisfaction of the requirements of law. It is a 'recommendation' and not a 'mandate' to conduct an enquiry. 'Recommendation' must be seen in contradistinction to 'direction' or 'mandate'. But recommendation itself vests the delinquent Public Information Officer or State Public Information Officer with consequences which are of serious nature and can ultimately produce prejudicial results including misconduct within the relevant service rules and invite minor and/or major **penalty**.

22. Thus, the principles of natural justice have to be read into the provisions of Section 20(2). It is a settled canon of civil jurisprudence including service jurisprudence that no person be condemned unheard. Directing disciplinary action is an order in the form of recommendation which has far reaching civil consequences. It will not be permissible to take the view that compliance with principles of natural justice is not a condition precedent to passing of a recommendation Under Section 20(2). In the case of *Udit Narain Singh Malpharian. Additional Member, Board of Revenue, Bihar* [MANU/SC/0045/1962 : AIR 1963 SC 786], the Court stressed upon compliance with the principles of natural justice in judicial or quasi-judicial proceedings. Absence of such specific requirement would invalidate the order. The Court, reiterating the principles stated in the English Law in the case of *King v. Electricity Commissioner*, held as under:

“The following classic test laid down by Lord Justice Atkin, as he then was, in *King v. Electricity Commissioners* and followed by this Court in more than one decision clearly brings out the meaning of the concept of judicial act:

““Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.””

“Lord Justice Slesser in *King v. London County Council* dissected the concept of judicial act laid down by Atkin, L.J., into the following heads in his judgment: “Wherever any body of persons (1) having legal authority (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially (4) act in excess of their legal authority—a writ of certiorari **may** issue.” It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A tribunal, therefore, exercising a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of certiorari will be granted to remove the record of proceedings of an inferior tribunal or authority exercising judicial or quasi-judicial acts, ex hypothesis it follows that the High Court in exercising its jurisdiction **shall** also act judicially in disposing of the proceedings before it.”

“23. Thus, the principle is clear and settled that right of hearing, even if not provided under a specific statute, the principles of natural justice **shall** so demand, unless by specific law, it is excluded. It is more so when exercise of authority is likely to vest the person with consequences of civil nature.

24. In light of the above principles, now we will examine whether there is any violation of principles of natural justice in the present case.”

“25...The Appellant was entitled to a hearing before an order could be passed against him under the provisions of Section 20(2) of the Act. He was granted no such hearing. The State Information Commission not only recommended but directed initiation of departmental proceedings against the Appellant and even asked for the compliance report. If such a harsh order was to be passed against the Appellant, the least that was expected of the Commission was to grant him a hearing/ reasonable opportunity to put forward his case. We are of the considered view that the State Information Commission should have granted an adjournment and heard the Appellant before passing an order Section under 20(2) of the Act. On that ground itself, the impugned order is liable to be set aside.”

HC-TRI Dayashis Chakma 2015:

“8. Coming to the second argument, as far as the scope of judicial review of administrative action is concerned, the principles in this regard are absolutely clear. One of the first principles laid down is that a person in whom discretion is vested must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because that is his will—he must exercise the discretion by following a course of reason and he must act reasonably. The rules of natural justice are also to be read into every administrative and judicial action. One of the greatest achievements of the development of the legal jurisprudence in India has been the development of the principles of natural justice and one of the main facets of natural justice is the right to be given a fair hearing. No man should be condemned unheard. Every person whose rights are to be affected has an undeniable right to be heard in the matter.

9. The principles of natural justice have been accepted in our jurisprudence in all administrative and quasi judicial and judicial actions and it is too late in the day for the respondent No. 5 to urge that even violation of these principles is not amenable to writ jurisdiction. From the facts we have narrated above, it is apparent that the State Information Commission did not deem it fit to issue notice to the respondents arrayed before it before condoning the delay. From the records we find that no application filed for condonation of delay but on the date when the matter was taken up by the Commission some fax message was received and merely on the basis of that fax message the delay was condoned without even giving the other party a chance of being heard.

10. These are not errors of jurisdiction as is sought to be made out by Mr. Somik Deb. But this is total unreasonableness and violation of the rules of natural justice and no Court can condone such violation of the principles of natural justice. Therefore, we reject the second contention of Mr. Deb and hold that the rules of natural justice have been violated in such a flagrant manner that the decision is amenable to the writ jurisdiction of this Court. ‘

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21. At the cost of repetition, we are again mentioning that we are not going into the merits of the case. Whether the information is covered by Section 8 or not, is not for us to decide. However two authorities had held this information was covered under Section 8 of the Right to Information Act. Therefore, if the Information Commissioner was to take a contrary view it was bound to hear the third party who is the present petitioner in the present case. No order could have been passed in his absence because that order affects his rights.

22. In view of the above discussion, we allow the writ petition, set aside the order of the Tripura Information Commission and remit the matter back to the Tripura Information Commission to decide the case afresh. It is made clear that the Tripura Information Commission must issue notices to the petitioner as well as to the State Public Information Officer i.e. the Sub Divisional Medical Officer, respondent No. 4 and the Appellate authority i.e. the Chief Medical Officer, respondent No. 3 and after giving them a hearing shall first decide whether there are sufficient grounds to condone delay or not. Only in case the delay is condoned, then the appeal shall be heard on merits.”

HC-DEL Ankur Mutreja 2012:

“8. It is clear from the language of Section 20(1) that only the opinion, whether the Information Officer has "without any reasonable cause" refused to receive the application for information or not furnished information within the prescribed time or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information etc., has to be formed "at the time of deciding the appeal". The proviso to Section 20(1) of the Act further requires the CIC to, after forming such opinion and before imposing any penalty, hear the Information Officer against whom penalty is proposed. Such hearing obviously has to be after the decision of the appeal. The reliance by the appellant on Section 19(8)(c) of the RTI Act is misconceived. The same only specifies the matters which the CIC is required to decide. The same cannot be read as a mandate to the CIC to pass the order of imposition of the penalty along with the decision of the appeal. Significantly, Section 19(10) of the Act requires CIC to decide the appeal "in accordance with such procedure as may be prescribed". The said procedure is prescribed in Section 20 of the Act, which requires the CIC to, at the time of deciding the appeal only form an opinion and not to impose the penalty.

9. The aforesaid procedure is even otherwise in consonance with logic and settled legal procedures. At the stage of allowing the appeal the CIC can only form an opinion as to the intentional violation if any by the Information Officer of the provisions of

the Act. Significantly, imposition of penalty does not follow every violation of the Act but only such violations as are without reasonable cause, intentional and mala fide.

10. While in deciding the appeal, the CIC is concerned with the merits of the claim to information, in penalty proceedings the CIC is concerned with the compliance by the Information Officers of the provisions of the Act. A discretion has been vested in this regard with the CIC. The Act does not provide for the CIC to hear the complainant or the appellant in the penalty proceedings, though there is no bar also thereagainst if the CIC so desires. However, the complainant cannot as a matter of right claim audience in the penalty proceedings which are between the CIC and the erring Information Officer. There is no provision in the Act for payment of penalty or any part thereof if imposed, to the complainant. Regulation 21 of the Central Information Commission (Management) Regulations, 2007 though provides for the CIC awarding such costs or compensation as it may deem fit but does not provide for such compensation to be paid out of the penalty if any imposed. The appellant cannot thus urge that it has a right to participate in the penalty proceedings for the said reason either.

11. The penalty proceedings are akin to contempt proceedings, the settled position with respect where to is that after bringing the facts to the notice of the Court, it becomes a matter between the Court and the contemnor and the informant or the relator who has brought the factum of contempt having been committed to the notice of the Court does not become a complainant or petitioner in the contempt proceedings. His duty ends with the facts being placed before the Court though the Court may in appropriate cases seek his assistance. Reference in this regard may be made to *Om Prakash Jaiswal v. D.K. Mittal* MANU/SC/0118/2000 : (2000) 3 SCC 171, *Muthu Karuppan, Commr. of Police, Chennai v. Parithi Ilamvazhuthi* MANU/SC/0418/2011 : (2011) 5 SCC 496 and Division Bench judgment of this Court in *Madan Mohan Sethi v. Nirmal Sham Kumari* MANU/DE/0423/2011. The said principle applies equally to proceedings under Order XXXIX, Rule 2A of the Civil Procedure Code, 1908 which proceedings are also penal in nature.

12. Notice may also be taken of Section 18 of the RTI Act which provides for the CIC to receive and inquire into complaints against the Information Officer. The legislature having made a special provision for addressing the complaints of aggrieved information seekers is indicative of the remedy of such aggrieved information seekers being not in the penalty proceedings under Section 20.

13. We therefore do not find any error in the procedure adopted by the CIC. Moreover, the appellant did not approach the CIC in this regard and preferred to file this petition directly.”

HC-DEL Maniram Sharma 2015:

“11.1 A Division Bench of this court vide a judgement dated 09.01.2012, passed in LPA No. 764/2011, titled: *Ankur Mutreja vs. Delhi University* had an occasion to rule upon the scope and ambit of the proceedings carried out by the CIC under Section 20 of the RTI Act. The observations made by the Division Bench, which are pertinent qua the case, are recorded in paragraphs 8, 9 & 10. For the sake of convenience, the same are extracted herein below:

“10. While in deciding the appeal, the CIC is concerned with the merits of the claim to information, in penalty proceedings the CIC is concerned with the compliance by the Information Officers of the provisions of the Act. A discretion has been vested in this regard with the CIC. The Act does not provide for the CIC to hear the complainant or the appellant in the penalty proceedings, though there is no bar also there against if the CIC so desires. However, the complainant cannot as a matter of right claim audience in the penalty proceedings which are between the CIC and the erring Information Officer. There is no provision in the Act for payment of penalty or any part thereof if imposed, to the complainant. Regulation 21 of the Central Information Commission (Management) Regulations, 2007 though provides for the CIC awarding such costs or compensation as it may deem fit but does not provide for such compensation to be paid out of the penalty if any imposed. The appellant cannot thus urge that it has a right to participate in the penalty proceedings for the said reason either. (emphasis is mine) ”

11.2 A perusal of the observations made in paragraph 10 of the Division Bench judgement would show that while there is no bar in the CIC entertaining an appellant / complainant before it in penalty proceedings, the matter is left to the discretion of

the CIC. An appellant / complainant, cannot, as a matter of right, as held by the Division Bench, claim audience in the "penalty proceedings" carried out under Section 20 of the RTI, Act.

11.3 Mr. Mittal, however, says that there are other judgements which he would like to place for consideration.

12. Having regard to the facts and circumstances, which arise in this case, I am inclined to accept the prayer of the petitioner to set aside the impugned communication dated 31.3.2014, and remand the case to respondent No. 1, i.e. the CIC for fresh consideration, from the stage, at which, it was positioned when, order dated 12.2.2014 was passed. It is ordered accordingly.

13. Respondent no.1/CIC shall, thereafter, take a decision as to whether or not it wishes to involve the petitioner in the penalty proceedings contemplated under Section 20 of the RTI Act. Though the matter is left, as per the observations of the Division Bench, to the discretion of the CIC, the CIC will take into account the circumstances which obtained in this matter, one of which, is that, what was brought to light, before this court, could not have got revealed but for the intercession of the petitioner.

13.1 For this limited purpose, the petitioner may appear before the CIC, which would then decide as to whether it would like the petitioner to participate in the penalty proceedings.”

c) Extracts from Judicial orders discussed in chapter 4

SC Union of India Vs. S. Srinivasan 2012:

16... Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. In this context, we may refer with profit to the decision in *General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav* MANU/SC/0165/1988 : AIR 1988 SC 876, wherein it has been held as follows: ... Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. 17. In *Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram* AIR 2000 SC 2143, it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. 18. In *Sukhdev Singh v. Bhagat Ram* MANU/SC/0667/1975 : AIR 1975 SC 1331, the Constitution Bench has held that the statutory bodies cannot use the power to make rules and Regulations to enlarge the powers beyond the scope intended by the legislature. Rules and Regulations made by reason of the specific power conferred by the statute to make rules and Regulations establish the pattern of conduct to be followed. 19. In *State of Karnataka and Anr. v. H. Ganesh Kamath etc.* MANU/SC/0269/1983 : AIR 1983 SC 550, it has been stated that it is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. 20. In *Kunj Behari Lal Butail and Ors. v. State of H.P. and Ors.* MANU/SC/0111/2000 : AIR 2000 SC 1069, it has been ruled thus: 13. It is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power conferred. If the rule making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act... 21. In *St. Johns Teachers Training Institute v. Regional Director* MANU/SC/0092/2003 : AIR 2003 SC 1533, it has been observed that a Regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limit of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. 22. In *Global Energy Ltd. and Anr. v. Central Electricity Regulatory Commission* MANU/SC/0979/2009 : (2009) 15 SCC 570,

this Court was dealing with the validity of Clauses (b) and (f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. In that context, this Court expressed thus: It is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the Regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act. 23. In the said case, while discussing further about the discretionary power, delegated legislation and the requirement of law, the Bench observed thus: The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters. 24. In this context, it would be apposite to refer to a passage from State of T.N. and Anr. v. P. Krishnamurthy and Ors. MANU/SC/1581/2006 : (2006) 4 SCC 517 wherein it has been held thus: 16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

HC-MAD The Registrar General Vs. R.M. Subramanian 2013:

"91. As far as the present case is concerned, the 1st Respondent/Petitioner was permitted by the Registry of this Court to peruse the documents relating to the Criminal Contempt Petition No. of 2010 in E.A. Nos. 11, 12 and 20 of 2003 in E.P. No. 5 of 2001 in O.S. No. 85 of 1985 on any working day during office hours, as per Section 2(j)(i) of the Right to Information Act and accordingly, he along with his counsel Thiru B. Chandran, perused the entire note file in Roc. No. 1490-A/2010/Judl./MB on 11.07.2011 and also made an endorsement to that effect.

92. At the risk of repetition, we point out that the 1st Respondent/Petitioner along with his counsel, not satisfied with the perusal of Roc. No. 1490-A/2010/Judl./MB on 11.07.2011, filed two R.T.I. Petitions dated 01.08.2011 and 18.08.2011 and sought for copies of the Minutes recorded by the Hon'ble Portfolio Judge for Pudukottai District dated 16.12.2010 and the Minutes recorded by the Hon'ble Chief Justice dated 07.03.2011. For that purpose, he filed Copy Application and remitted a flat rate of Rs. 70/- (Rs. 35/- for obtaining the copies of the minutes). In this regard, we relevantly point out that the Notings, Jottings, Administrative Letters, Internal Deliberations and Intricate Internal Discussions etc. on the administrative side of the Hon'ble High Court cannot be brought under Section 2(j) [under the caption 'Right to Information'] of the Right to Information Act, 2005, in the considered opinion of this Court.

93. To put it succinctly, the copies of Minutes recorded by the Hon'ble Portfolio Judge, Pudukottai District dated 16.12.2010 and the Minutes recorded by the Hon'ble Chief Justice on 07.03.2011 in the Criminal Contempt Petition issue, cannot be furnished or supplied to the 1st Respondent/Petitioner, for the purpose of maintaining utmost confidentiality and secrecy of the delicate function of the internal matters of High Court. If the copies of the Minutes dated 16.12.2010 and 07.03.2011, as claimed by the 1st Respondent/Petitioner, are furnished, then, it will definitely make an inroad to the proper, serene function of the Hon'ble High Court being an Independent Authority under the Constitution of India. Moreover, the Hon'ble Chief Justice of High Court [as Competent Authority Public Authority under Section 2(e)(iii) and 2(h)(a) of the Act, 22 of 2005 and also Plenipotentiary in the Judicial hierarchy] can be provided with an enough freedom and inbuilt safeguards in exercising

his discretionary powers either to furnish the information or not to part with the information, as prayed for by any applicant much less the 1st Respondent/Petitioner.

94. That apart, if the copies of the Minutes dated 16.12.2010 and 07.03.2011 are supplied to the 1st Respondent/Petitioner, then, the interest of the administration of the High Court will get jeopardised and also it will perform the Petitioner/High Court to furnish the informations sought for by the concerned Applicants/Requisitionists as a matter of usual course without any qualms or rhyme or reasons/restrictions. In effect, to uphold the dignity and majesty of the Hon'ble High Court being an Independent Authority under the Constitution of India, some selfrestrictions are to be imposed as regards the supply of internal/domestic functioning of the Hon'ble High Court and its office informations in respect of matters which are highly confidential in nature inasmuch as it concerns with the Intricate, Internal Discussions and Deliberations, Notings, Jottings and Administrative Decisions taken on various matters at different levels and as such, they are exempted from disclosure under Section 8(e)(i)(j) of the Right to Information Act, 2005. Even otherwise, they are not open to litigants/public without restrictions. No wonder, it can be fittingly observed that if Impartiality is the Soul of Judiciary, then, Independence is the Life Blood of Judiciary. Also that, without Independence, Impartiality cannot thrive/survive.

95. In short, if the informations sought for by the 1st Respondent/Petitioner are furnished, then, it will prejudicially affect the confidential interest, privacy and well being of the High Court, in the considered opinion of this Court. In any event, the 1st Respondent/Petitioner cannot invoke the aid of Clause 37 of Amended Letters Patent dealing with 'Regulation of Proceedings' and also Order XII [pertaining to the entitlement of Certified Copies] of the Rules of the High Court, Madras, Appellate Side, 1965, since they are not applicable to him. For the foregoing elaborate discussions and reasons and on an overall assessment of the facts and circumstances of the case which float on the surface, we unhesitatingly hold that the contention of the Public Information Officer, Office of the Registrar, High Court, Madurai Bench of Madras High Court pointing out before the 2nd Respondent/Tamil Nadu Information Commission that 'the Commission, on numerous occasions, has determined procedures for receipt of documents from Court' as if it is a Judicial order, is not legal. Likewise, the order of the 2nd Respondent/Tamil Nadu Information Commission, Chennai in Case No. 11224/Enquiry/A/2012 dated 22.05.2012, in advising the 1st Respondent/Petitioner to obtain the copies of the Minutes, by filing a Copy Application before Court, as per the procedure followed by the Judicial Department and closing the case, is prima facie unsustainable in the eye of law. Accordingly, this Court, in the interest of Justice, interferes with the said order dated 22.05.2012 in Case No. 11224/Enquiry/A/2012 passed by the 2nd Respondent/Tamil Nadu Information Commission, Chennai and sets aside the same, to advance the cause of Justice. Resultantly, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed." (Emphasis added)

HC-MAD The Registrar General, High Court of Madras Vs. K. Elango 2013:

"58...Added further, if the informations sought for by the 1st Respondent/Applicant, through his letter dated 01.11.2010 addressed to the Public Information Officer of High Court, are divulged, then, it will open floodgates/Pandora Box compelling the Petitioner/High Court to supply the informations sought for by the concerned Requisitionists as a matter of routine, without any rhyme or reasons/restrictions as the case may be. Therefore, some self restrictions are to be imposed in regard to the supply of informations in this regard. As a matter of fact, the Notings, Jottings, Administrative Letters, Intricate Internal Discussions, Deliberations etc. of the Petitioner/High Court cannot be brought under Section 2(i) of the Right to Information Act, 2005, in our considered opinion of this Court. Also that, if the informations relating to Serial Nos. 1 to 9 mentioned in the application of the 1st Respondent/Applicant dated 01.11.2010 are directed to be furnished or supplied with, then, certainly, it will impede and hinder the regular, smooth and proper functioning of the Institution viz., High Court (an independent authority under the Constitution of India, free from Executive or Legislature), as opined by this Court. As such, a Saner Counsel/Balancing Act is to be adopted in matters relating to the application of the Right to Information Act, 2005, so that an adequate freedom and inbuilt safeguard can be provided to the Hon'ble Chief Justice of High Court [competent authority and public authority as per Section 2(e)(iii) and 2(h)(a) of the Act 22 of 2005] in exercising his discretionary powers either to supply the information or to deny the information, as prayed for by the Applicants/Requisitionists concerned.

59. Apart from the above, if the informations requested by the 1st Respondent/Applicant, based on his letter dated 01.11.2010, are supplied with, then, it will have an adverse impact on the regular and normal, serene functioning of the High Court's Office on the Administrative side. Therefore, we come to an irresistible conclusion that the 1st Respondent/Applicant is not entitled to be supplied with the informations/details sought for by him, in his Application dated 01.11.2010 addressed to the Public Information Officer of the High Court, Madras under the provisions of the Right to Information Act. . . . Further, we are of the considered view that the 1st Respondent/Applicant has no locus standi to seek for the details sought for by him, as stated supra, in a wholesale, omnibus and mechanical fashion in the subject matter in issue, (either as a matter of right/routine under the Right to Information Act) because of the simple reason that he has no enforceable legal right. Also, we opine that the 1st Respondent/Applicant's requests, through his Application dated 01.11.2010 and his Appeal dated 20.12.2010, suffer from want of bonafides (notwithstanding the candid fact that Section 6 of the Right to Information Act does not either overtly or covertly refers to the 'concept of Locus').

60. To put it differently, if the informations sought for by the 1st Respondent/Applicant, through his letter dated 01.11.2010/ Appeal dated 20.12.2010, are divulged or furnished by the Office of the High Court (on administrative side), then, the secrecy and privacy of the internal working process may get jeopardized, besides the furnishing of said informations would result in invasion of unwarranted and uncalled for privacy of individuals concerned. Even the disclosure of informations pertaining to departmental enquiries in respect of Disciplinary Actions initiated against the Judicial Officers/ Officials of the Subordinate Court or the High Court will affect the facile, smooth and independent running of the administration of the High Court, under the Constitution of India. Moreover, as per Section 2(e) of the read with Section 28 of the Right to Information Act, the Hon'ble Chief Justice of this Court is empowered to frame rules to carry out the provisions of the Act. In this regard, we point out that 'Madras High Court Right to Information (Regulation of Fee and Cost) Rules, 2007' have been framed [vide R.O.C. No. 2636-A/06/F1 SRO C-3/2008] in Tamil Nadu Gazette, No. 20, dated 21.05.2008, Pt. III, S. 2. Also, a Notification, in Roc. No. 976 A/2008/RTI dated 18.11.2008, has been issued by this Court to the said Rules, by bringing certain amendments in regard to the Name and Designation of the Officers mentioned therein, the same has come into force from 18.11.2008. In the upshot of quantitative and qualitative discussions mentioned supra, we hold that the view taken by the 2nd Respondent/Tamil Nadu Information Commission, Chennai, in Appeal Case No. 10447/Enquiry/A/11 dated 10.01.2012 that 'the appellants has asked only for statistical details and not names of individuals', is per se not correct. As such, the conclusion arrived at by the 2nd Respondent/Information Commission, in allowing the Appeal and directing the Petitioner/High Court (Public Authority) to furnish the details within 15 days from the date of receipt of copy of this order, is not sustainable, in the eye of law. Therefore, to prevent an aberration of Justice and to promote substantial cause of Justice, this Court interferes with the order dated 10.01.2012 in Case No. 10447/Enquiry/A/11 passed by the 2nd Respondent/Tamil Nadu Information Commission, Chennai and sets aside the same, to secure the ends of Justice. Resultantly, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed." (Emphasis added)

HC-MAD The Public Information Officer Vs. The Central Information Commission 2014:

"20. Under the RTI Act, a citizen of this country has a right to information as defined under Sections 2(f) and 2(j), of course, subject to certain restrictions as provided under the Act. What information one can seek and what right one can have, are specifically contemplated under Sections 2(f) and 2(j) respectively. However, the word "right" is not defined under the RTI Act. In the absence of any definition of "right", it has to be understood to mean that such "right" must have a legal basis. Therefore, the "right" must be coupled with an object or purpose to be achieved. Such object and purpose must, undoubtedly, have a legal basis or be legally sustainable and enforceable. It cannot be construed that a request or query made 'simpliciter', will fall under the definition of "right to information". The "right" must emanate from legally sustainable claim. There is a difference between the "right to information" and the "right to seek information". It is like the "right to property" and the "right to claim property". In the former, such right is already accrued and vested with the seeker, whereas, in the latter, it is yet to accrue or get vested. Likewise, a person who seeks information under the RTI Act, must show that the information sought for is either for

his personal interest or for a public interest. Under both circumstances, the information seeker must disclose atleast with bare minimum details as to what is the personal interest or the public interest, for which such information is sought for. If such details are either absent or not disclosed, such query cannot be construed as the one satisfying the requirement of the RTI Act. The restrictions imposed under the RTI Act, though are in respect of providing certain informations, certainly, there are certain inbuilt restrictions imposed on the applicant as well.”

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“25. ... furnishing of those information with regard to the Registrar General which has been done by the Honourable Chief Justice of this Court, cannot be brought under the purview of Section 2(j) of the RTI Act, as, such information pertain to the internal intricate functioning/administration of the High Court and such information has no relationship with any public activity or interest. As observed by the Division Bench therein, certainly, furnishing of those information will hinder the regular, smooth and proper functioning of the institution, unnecessarily warranting scrupulous litigations. In fact, a perusal of the pleadings, more particularly, the application made by the second respondent as well as the counter affidavit filed in this Writ Petition, would show that the second respondent has not disclosed even the basic reason for seeking those informations. On the other hand, he has made those applications mechanically, as a matter of routine under the RTI Act. The Division Bench of this Court, in the said decision, has also observed that the first respondent in that Writ Petition who is similar to the present second respondent, has no locus-standi to seek for the details sought for by him, as he has no enforceable legal right. Further, posting a Senior District Judge as Registrar General by the Honourable Chief Justice is in exercise of powers conferred under Article 229 of the Constitution of India and the second respondent or any other person including other Judges, has no say in the said matter. The said issue is already settled by the Honourable Supreme Court in the decision reported in MANU/SC/0137/1998 : 1998 (3) SCC 72 (High Court Judicature for Rajasthan Vs. Ramesh Chand Palival) and in paragraph 38, the Honourable Supreme Court held that under the Constitutional Scheme, Chief Justice is the supreme authority and other Judges, so far as officers and servants of the High Court are concerned, have no role to play on the administrative side. The said position is reiterated in the subsequent decision of the Supreme Court reported in MANU/SC/1097/2011 : 2012 (1) MLJ 289 (SC) (Registrar General Vs. R. Perachi).

26. Insofar as query (iv) is concerned, we fail to understand as to how the second respondent is entitled to justify his claim for seeking the copies of his own complaints and appeals. It is needless to say that they are not the information available within the knowledge of the petitioner; on the other hand, admittedly, they are the documents of the second respondent himself, and therefore, if he does not have copies of the same, he has to blame himself and he cannot seek those details as a matter of right, thinking that the High Court will preserve his frivolous applications as treasures/valuable assets. Further, those documents cannot be brought under the definition "information" as defined under Section 2(f) of the RTI Act. Therefore, we reject the contention of the second respondent in this aspect.

27. Insofar as query (vi) is concerned, admittedly, the matter is sub-judice and pending before the High Court in Crl. O.P. No. 18804 of 2010. To that effect, already information had been furnished by the petitioner to the second respondent on 13.3.2012 informing that his petition has been put up along with the case bundle. Therefore, the second respondent is not entitled to get any information with regard to the proceedings pending before the Court of Law and if at all he wants any document relating to the pending case/cases, he has to only apply for certified copy and obtain the same in terms of the Rules framed by the High Court. No doubt, the second respondent is seeking information regarding the action taken against inclusion of one Ms. Geetha Ramaseshan as Advocate in Crl.O.P. No. 18804 of 2010. Since his complaint has been put up along with the case bundle, which is pending before Court, the petitioner, certainly, is precluded from furnishing any information, as the matter is seized of by the Court in Crl.O.P. No. 18804 of 2010 on its judicial side.” (Emphasis added)

HC-MEG Belma Mawrie 2015:

“11. From the grounds amongst others taken in the said Appeal No. 2 of 2015 before the State Chief Information Commissioner, Meghalaya, Shillong, it is crystal clear that the appellatant i.e. respondent No. 2 is asking the State Chief Information Commissioner to decide the validity or otherwise of the High Court of Meghalaya (RTI) Rules, 2013. Unless and

until Rules 4 and 5 of the High Court of Meghalaya (RTI) Rules, 2013 are held illegal/ or contrary to the Parent Act i.e. RTI Act, 2005, the Appeal No. 2 of 2015 cannot be allowed. In other words, the result of the appeal i.e. Appeal No. 2 of 2015 solely based on the legality or otherwise of Rules 4 and 5 of the High Court of Meghalaya (RTI) Rules, 2013 or the High Court of Meghalaya (RTI) Rules, 2013. Now, the question is can the State Chief Information Commissioner, Shillong decide the validity or otherwise of the High Court of Meghalaya (RTI) Rules, 2013. We may recall the observations of the Apex Court (Constitution Bench) through Justice S. Ratnavel Pandian (as then he was) in *Kartar Singh v. State of Punjab*: MANU/SC/1597/1994 : (1994) 3 SCC 569 that "When Law ends, Tyranny begins; Legislation begins where Evil begins. The function of the Judiciary begins when the function of the Legislature ends, because the law is, what the judges say it is since the power to interpret the law vests in the judges."

The State Chief Information Commissioner is a creature of the statute i.e. RTI Act, 2005 and it is constituted under Section 15 of the RTI Act, 2005. The powers and functions of the State Chief Information Commissioner are more-fully provided under Sections 18 and 19 of the RTI Act, 2005. Sections 18 and 19 of the RTI Act, 2005 had been quoted above in extenso. It is well settled that the creatures of the statute are to discharge powers and functions as provided in the statute itself. It is equally well settled that an authority which is a creature of a statute cannot decide whether the very statute of which he is a creature is a valid statute or not. It is also fairly well settled that the Rules framed by the High Court in exercise of its powers under Article 225 of the Constitution of India is a law made by the High Court. No doubt, the Rules framed by the Chief Justice of the High Court in exercise of his powers conferred by Sub-section (1) of Section 28 read with Section 2(e)(iii) of the RTI Act, 2005 is also a law made by the High Court. The Apex Court in *Union of India v. Ram Kanwar & Ors.* MANU/SC/0387/1961 : AIR 1962 SC 247 held that the rules framed by the High Court of Punjab in the matter of Letters Patent for the High Court will certainly be a law made in respect of special cases covered by it. It will certainly be a special law within the meaning of Section 29(2) of the Limitation Act.

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12. *The Gauhati High Court in the State of Assam & Ors. v. Naresb Chandra Das & Anr.* MANU/GH/0009/1983 : AIR 1983 Gau 24 held that:

"6. Article 225 of the Constitution confers the same powers and jurisdiction to the existing High Courts as they possessed immediately before the commencement of the Constitution. The power that was conferred on the High Courts by Section 108, Government of India Act, 1915 still subsists. It has not been affected in any manner whatsoever either by the Government of India Act, 1935 or by the Constitution of India. On the other hand, it has been kept alive and reaffirmed with greater vim and vigour. The High Courts enjoy the same unfettered power, as they had enjoyed under Section 108 of the Government of India Act, 1915, of making rules and providing whether an appeal has to be heard by one Judge or more Judges. Therefore, "the Rules" framed by the Gauhati High Court under Article 225 of the Constitution are special laws within the meaning of Section 29(2) of the Limitation Act. 1963."

13. *The Central Information Commission itself in CIC/SM/C/2011/901285 between Shri C.J. Karira - Complainant v. PIO High Court of Madras - Respondent* clearly held that the Commission should not get into the question of the legal validity of the rules made by the Chief Justice of the High Court of Madras i.e. High Court Right to Information (Regulation of Fee and Cost) Rules, 2006 framed by the High Court of Madras as the said Rules framed by the Chief Justice of the High Court of Madras in exercise of the powers to make rules under Section 28 of the RTI Act, 2005 is not within the purview of the Commission. As stated above, the Commission is a creature of the statute and its powers had been clearly provided by the RTI Act, 2005 and the powers so conferred to the Commission do not include the power to question the validity of the rules made by the Chief Justice. Paras 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the judgment in *Shri C.J. Karira's case (Supra)* read as follows:-

"12. We agree with Shri Jain that the Commission has jurisdiction (to the exclusion of the jurisdiction of a State Information Commission) on the High Courts in the country in respect of matters concerning the exercise of right to information by a citizen. In other words, the Commission is the second appellate authority in respect of all the High

Courts and also it has jurisdiction to entertain complaints under section 18 in appropriate cases pertaining to the High Courts.

13. As already indicated above, the issue for consideration is about the jurisdiction of the Commission to entertain the complaint. A careful consideration of the matter would indicate that the thrust of the complaint and the arguments of the complainant is about the validity of the exercise of legislative competence by the Hon'ble Chief Justice of the High Court of Madras in making the rules which are contended to be against the letter and spirit of the Act.

14. From a combined reading of sections 18 to 20 of the Act, it would be clear that the contents of the complaint do not fall in the ambit of section 18 or 19. There is no provision in the Act which empowers the Commission to entertain and examine the issue relating to the exercise of rule making power by the appropriate Government or the competent authority under the Act.

15. The purposes of section 25(5) and sections 18 to 20 are distinct. The purpose of section 25(5) is to give a recommendation specifying the steps to be taken by the public authority for promoting conformity with the provisions of the Act if it appears to the Commission that the practice of a public authority does not correspond with the Act. The purpose of sections 18 to 20 is to handle complaints and second appeals filed before the Commission as per provisions of the Act and the rules framed thereunder.

16. The recommendation made under section 25(5) of the Act in case No. CIC/WB/C/2010/900031, etc. relied upon by Shri Jain is distinguishable as in that case the Commission was concerned with the matter relating to the compliance of provisions of section 4 of the Act and not the validity of the rules framed under the Act. Any recommendation to take specified steps under section 25(5) of the Act will be made by the Commission on the administrative side only when it appears to the Commission that the practice of a public authority in relation to the exercise of its functions under the Act does not conform with the provisions of the Act.

17. In the light of above, the plea of Shri Jain to follow the above mentioned precedent and make a recommendation under section 25(5) cannot be accepted.

18. The Commission in its decision in case No. CIC/AT/A/2008/01137 dated 13.3.2009 mentioned above has held that the manner in which a competent authority, [under section 2(e)], exercises its powers to frame rules under section 28 is not within the purview of this Commission.

19. It is apparent from above that the Commission should not get into the question of the legal validity of the rules made and the question of competence of the rule making authority.

20. In the light of the above discussion and in the circumstances of the case, we are of the view that the Central Information Commission, while having the jurisdiction to entertain a second appeal under section 19 and a complaint under section 18 of the RTI Act, does not have the jurisdiction to entertain the complaint under reference by virtue of its contents."''

“14. The Apex Court in *West Bengal Electricity Regulatory Commission v. CESC Ltd.* MANU/SC/0859/2002 : (2002) 8 SCC 715 had discussed the powers and jurisdictions of the High Court sitting as an appellate court in exercise of the powers under a statute and held that the High Court sitting as an appellate court in exercise of power under a statute cannot exercise its writ jurisdiction for the purpose of declaring provision of that law invalid in absence of any separate challenge to that law by filing a writ petition. The validity or otherwise of a statute can be looked into by the High Court by exercising writ jurisdiction and not as an appellate authority under a statute. Paras 41, 42, 43, 44, 45, 46, 49 and 50 of the SCC in *West Bengal Electricity Regulatory Commission's case (Supra)* read as follows:-

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“46. From the above decision, we hold that the High Court while exercising its statutory appellate power under Section 27 of the 1998 Act could not have gone into the validity of the Regulations which are part of the statute itself.

49. In the case of *Dhulabhai v. State of M.P.* MANU/SC/0157/1968 : AIR 1969 SC 78 : (1968) 3 SCR 662 a Constitution Bench of this Court held: (SCR p. 682 F-G)

“(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.” (emphasis supplied)”

“50. From the above observations of this Court in the said judgment extracted hereinabove, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so. Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition. In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the Commission has not given any indiscriminate hearing to the consumers.”

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16. From the ratio decidendi of the cases discussed above, it is crystal clear that the State Chief Information Commissioner which is a creature of the statute i.e. RTI Act, 2005, in exercise of its jurisdiction as an appellate authority cannot question the validity of the rules framed under the same statute i.e. RTI Act, 2005 in an appeal i.e. Appeal No. 2 of 2015 against the order passed by the First Appellate Authority. Therefore, the questions fall for consideration in the present writ petition are decided against the State Chief Information Commissioner, Meghalaya, Shillong. As the result of the Appeal No. 2 of 2015 solely depends on the jurisdiction of the State Chief Information Commissioner to question the validity or otherwise of the High Court of Meghalaya (RTI) Rules, 2013, the Appeal No. 2 of 2015 is devoid of merit inasmuch as (i) the State Chief Information Commissioner as an appellate authority under the RTI Act, 2005 has no jurisdiction to question the validity or otherwise of the High Court of Meghalaya (RTI) Rules, 2013 framed under the same statute i.e. RTI Act, 2005 and (ii) the application dated 07.08.2014 filed by the respondent No. 2 cannot be entertained under Rules 4 and 5 of the High Court of Meghalaya (RTI) Rules, 2013.” (Emphasis added)

HC-DEL CPIO, SCI 2009:

30. As noted previously, “public authority” has been widely defined; it includes an authority created by or under the Constitution of India. The CIC concluded that the CJI is a public authority, on a facial reading of Article 124. The provision is under the heading “Establishment and constitution of the Supreme Court,” and in the relevant part, it says that “There shall be a Supreme Court of India consisting of a Chief Justice of India and...” The Act, notes the CIC, also provides for competent authorities defined by Section 2(e). The CJI is one such specified competent authority, in relation to the Supreme Court, under Section 2(e) (ii) of the Act and Section 28 empowers him to frame Rules to carry out purposes of the Act. In view of these provisions, the court is of opinion that the CIC did not commit any error in concluding that the CJI is a public authority.

31. The second point, which flows out of the first, requires further examination. It is contended that the office of the CJI is different from that of the Registry (of the Supreme Court); the further contention here appears to be that the CJI performs a verisimilitude of functions, than merely as Chief Justice of the Supreme Court, and in such capacity, through his office, separately holds asset declarations, and information relating to it, pursuant to the 1997 resolution.

32. That the Constitution recognizes the CJI's prominent role in higher judicial appointments is stating the obvious. ... nevertheless the CJI discharges various other functions. The question is whether those are exempted from the Act.

34. Now, there cannot be any two opinions about the reality that the Chief Justice of India performs a multitude of tasks, specifically assigned to him under the Constitution and various enactments; he is involved in the process of appointment of judges of High Courts, Chief Justices of High Courts, appointment of Judges of Supreme Court, transfer of High Court judges and so on. Besides, he discharges administrative functions under various enactments or rules, concerning appointment of members of quasi judicial W.P.(C) 288/2009 tribunals; ... administration of legal aid, and heads policy formulation bodies... It is quite possible therefore, that the Chief Justice, for convenience maintains a separate office or establishment. ..

35. What this court cannot ignore, regardless of the varied roles of the CJI, is that they are directly relatable to his holding the office of CJI, and heading the Supreme Court. His role as Chief Justice of India, is by reason of appointment to the high office of the head of the Supreme Court... There is no provision, other than Section 24, exemption organizations. There is no clue in these provisions, that the office of the Chief Justice of India, is exempt... To conclude that the CJI does not hold asset declaration information in his capacity as Chief Justice of India, would also be incongruous, since the 1997 resolution explicitly states that the information would be given to him. In these circumstances the court concludes that the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is W.P.(C) 288/2009 a "public authority" under the Act and is covered by its provisions. The second point stands decided, accordingly.

d) Extract from IC order discussed in chapter 13

SIC/ASS/ KP(M)636/2012:

"The case in brief:

The RTI application, dated 1.10.12 was submitted to the SPIO in the office of the Commissioner & Secretary to the Govt. of Assam, GAD seeking the certified documents on as many as 12 subjects relating to the management of the Assam Bhawan, Mumbai. The application was received by the SPIO on 5.10.12 and was transferred to the Deputy Resident Commissioner, Assam Bhawan, Mumbai on 10.10.12, which was received in Assam Bhawan, Mumbai on 26.10.12. As the applicant was a BPL card holder, the Dy. Res. Commissioner informed him on 27.10.12 that furnishing of the copies of the entire documents would involve huge expenditure for which he was not having the required financial powers and he had, therefore, sought advice from the Govt. in that regard. The applicant then submitted a petition to the Information Commission on 18.11.12, which was forwarded to the Commissioner & Secretary to the Govt. of Assam, GAD for disposal within 30 days. The Commissioner & Secretary to the Govt. of Assam, GAD disposed of the same by a speaking order on 7.6.13, whereupon it was clarified that as the application had already been transferred, so he had no role in disposing of the same. He, however, directed the Deputy Resident Commissioner, Assam Bhawan, Mumbai to furnish the information accordingly, but did not appear to consider the problem referred to him by the Deputy Resident Commissioner in his above-cited letter, dt. 27.10.12. Not getting any response again, the petitioner submitted the second appeal to the Information Commission on 12.7.13, in response to which the matter was heard on 20.12.13.

While the Public Authority was represented by the SPIO as well as the 1st Appellate Authority, the appellant remained absent by informing over phone that he could not attend the hearing due to the "Assam bandh" declared by some organization.

Submission of the Public Authorities:

The SPIO submitted that the required information involved as many as 17,820 pages and it was not possible for him to get the entire documents photocopied for furnishing the same to the applicant free of cost, for which he had referred the matter to the higher authority for advice. The problem had also been intimated to the applicant. He further submitted that, the information being quite voluminous, furnishing of the copies of the entire documents free of cost would involve disproportionate diversion of available resources, for which he had brought a letter addressed to the applicant and issued vide No. ABM(RTI)5/2013/12, dt. 20.12.2013 enclosing photocopies of 19 pages of documents, wherein he had tried to clarify all the points raised in the RTI application. He also brought the Registers and lot of other documents to the Commission for showing the same to the appellant during the hearing itself.

Decision of the Commission:

After careful examination of the available records produced before the Commission and duly considering the submission made by the Public Authority, the Commission was convinced that the required information was quite voluminous and its furnishing free of cost to the applicant would have involved disproportionate diversion of available resources. The Commission, therefore, appreciated the move of the SPIO to bring the documents all the way from Mumbai to Guwahati to enable the applicant to inspect the same free of cost at the time of hearing itself. However, in absence of the appellant, the same could not be done. On asking by the Commission, the SPIO informed that he would stay at Guwahati till the evening of 23.12.2013. The Commission, therefore, informed the appellant over phone to make it convenient to come to the Commission within 23.12.13 and inspect the documents in the Commission in presence of the SPIO himself. The appellant, however, failed to turn up for the same and the Commission, therefore, directs that the SPIO's letter No. ABM(RTI)5/2013/12, dt. 20.12.2013, submitted to the Commission along with the photocopies of 19 pages of documents, be sent to the appellant for his information. In addition, if he desires to have copies of more documents, the SPIO would provide the same free of cost subject to the maximum of 50 pages, as specified by the appellant within 20 days from the date of issue of this order.”

e) Extracts from judicial orders discussed in chapter 16

SC ICAI 2011:

“12. Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. ... if information relating to the intellectual property, that is the question papers, solutions/model answers and instructions, in regard to any particular examination conducted by the appellant cannot be disclosed before the examination is held...the position will be different once the examination is held. Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held. In fact the question papers are disclosed to everyone at the time of examination. The appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year, after the examination. ...”

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“16. The instructions and `solutions to questions' issued to the examiners and moderators in connection with evaluation of answer scripts, ... is the intellectual property of ICAI. These are made available by ICAI to the examiners and moderators to enable them to evaluate the answer scripts correctly and effectively, in a proper manner, to achieve uniformity and consistency in evaluation, as a large number of evaluators and moderators are engaged by ICAI in connection with the evaluation. The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence. The examiners and moderators are required to maintain absolute secrecy and cannot disclose the answer scripts, the evaluation of answer scripts, the instructions of ICAI and the solutions to questions made available by ICAI, to anyone. The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information... When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a fiduciary relationship.

17. It should be noted that section 8(1)(e) uses the words "information available to a person in his fiduciary relationship. Significantly section 8(1)(e) does not use the words "information available to a public authority in its fiduciary relationship". The use of the words "person" shows that the holder of the information in a fiduciary relationship need not only be a `public authority' as the word `person' is of much wider import than the word `public authority'. Therefore the exemption under section 8(1)(e) is available not only in regard to information that is held by a public authority (in this case the examining body) in a fiduciary capacity, but also to any information that is given or made available by a public authority to anyone else for being held in a fiduciary relationship. In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship. As a consequence, it has to be held that the instructions and solutions to questions communicated by the examining body to the examiners, head-examiners and moderators, are information

available to such persons in their fiduciary relationship and therefore exempted from disclosure under section 8(1)(d) [sic – presumably 8(1)(e)] of RTI Act.”

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“20. In this case the Chief Information Commissioner rightly held that the information sought under queries (3) and (5) were exempted under section 8(1)(e) and that there was no larger public interest requiring denial of the statutory exemption regarding such information.”

“22. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to students who participate in an examination, as a government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words ‘information available to a person in his fiduciary relationship’ are used in section 8(1)(e) of RTI Act in its normal and well recognized sense... We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer-books, that come into the custody of the examining body.”

“23... It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer books are evaluated by the examining body.

24. We may next consider whether an examining body would be entitled to claim exemption under Section 8(1) (c) of the RTI Act, even assuming that it is in a fiduciary relationship with the examinee. That section provides that notwithstanding anything contained in the Act, there shall be no obligation to give any citizen information available to a person in his fiduciary relationship. This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself. One of the duties of the fiduciary is to make thorough disclosure of all the relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer books to anyone else. If A entrusts a document or an article to B to be processed, on completion of processing, B is not expected to give the document or article to anyone else but is bound to give the same to A who entrusted the document or article to B for processing. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer book, Section 8(1)(e) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer book, seeking inspection or disclosure of it. (Emphasis added).

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“26... The question is whether the information relating to the ‘evaluation’ (that is assigning of marks) is held by the examining body in a fiduciary relationship. The examining bodies contend that even if fiduciary relationship does not exist with reference to the examinee, it exists with reference to the examiner who evaluates the answer-books. On a careful examination we find that this contention has no merit. The examining body entrusts the answer-books to an examiner for evaluation and pays the examiner for his expert service... the examining body is the ‘principal’ and the examiner is the agent entrusted with the work, that is, evaluation of answer-books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner. On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copy-right or proprietary right, or confidentiality right in regard to the evaluation. Therefore it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner... We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary

relationship, the exemption under section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books.”

HC-DEL IIT 2011:

“10. It is next submitted that under Section 8(1)(e) of the RTI Act, there is a fiduciary relationship that the Petitioner shares with the evaluators and therefore a photocopy of the ORS cannot be disclosed. Reliance is placed on the decision by the Full Bench of the CIC rendered on 23rd April 2007 in *Rakesh Kumar Singh v. Harish Chander*.

11. In the first place given the fact that admittedly the evaluation of the ORS is carried out through a computerized process and not manually, the question of there being a fiduciary relationship between the IIT and the evaluators does not arise. Secondly, a perusal of the decision of the CIC in *Rakesh Kumar Singh v. Harish Chander* shows that a distinction was drawn by the CIC between the OMR sheets and conventional answer sheets. The evaluation of the ORS is done by a computerized process. The non-ORS answer sheets are evaluated by physical marking. It was observed in para 41 that where OMR (or ORS) sheets are used, as in the present cases, the disclosure of evaluated answer sheets was "unlikely to render the system unworkable and as such the evaluated answer sheets in such cases will be disclosed and made available under the Right to Information Act unless the providing of such answer sheets would involve an infringement of copyright as provided for under Section 9 of the Right to Information Act."

12. Irrespective of the decision dated 23rd April 2007 of the CIC in *Rakesh Kumar Singh v. Harish Chander*, which in any event is not binding on this Court, it is obvious that the evaluation of the ORS/ORM sheets is through a computerized process and no prejudice can be caused to the IIT by providing a candidate a photocopy of the concerned ORS. This is not information being sought by a third party but by the candidate himself or herself. The disclosure of such photocopy of the ORS will not compromise the identity of the evaluator, since the evaluation is done through a computerized process. There is no question of defence under Section 8(1)(e) of the RTI Act being invoked by the IIT to deny copy of such OMR sheets/ORS to the candidate.

13. It is then urged by Mr. Mitra that if the impugned orders of the CIC are sustained it would open a "floodgate" of such applications by other candidates as a result of which the entire JEE and GATE system would "collapse". The above apprehension is exaggerated. If IIT is confident that both the JEE and GATE are fool proof, it should have no difficulty providing a candidate a copy of his or her ORS. It enhances transparency. It appears unlikely that the each and every candidate would want photocopies of the ORS.

14. It is then submitted that evaluation done of the ORS by the Petitioner is final and no request can be entertained for re-evaluation of marks. Reliance is placed on the order dated 2nd July 2010 passed by the learned Single Judge of this Court in *Adha Srujana v. Union of India Writ Petition (Civil) No. 3807 of 2010*. This Court finds that the question as far as the present case is concerned is not about the request of the Respondents for re-evaluation or re-totalling of the marks obtained by them in the JEE 2010 or GATE 2010. Notwithstanding the disclosure of the ORS to the Respondent, IIT would be within its rights to decline a request from either of them for re-evaluation or re-totalling in terms of the conditions already set out in the information brochure. The decision dated 2nd July 2010 by this Court in *W.P. (C) No. 3807 of 2010* has no application to the present case.

15. The right of a candidate, sitting for JEE or GATE, to obtain information under the RTI Act is a statutory one. It cannot be said to have been waived by such candidate only because of a clause in the information brochure for the JEE or GATE. In other words, a candidate does not lose his or her right under the RTI Act only because he or she has agreed to sit for JEE or GATE. The condition in the brochure that no photocopy of the ORS sheet will be provided, is subject to the RTI Act. It cannot override the RTI Act.

HC-CHH Kewal Singh Gautam 2011:

“11. Fiduciary relationship is one where a party stands in a relationship of trust to another party. The said relationship gives rise to an obligation to protect the interest of other party. Present is not a case where the petitioners are seeking disclosure of an information with regard to the valuation done by the examiner in respect of any other departmental candidate who appeared in

the examination. The petitioners are only seeking disclosure of information which would also include supply of certified copies of the answer sheet of their own. It is neither the case of the respondents nor any material has been placed before this Court either in the form of any provision having the force of law applicable in the matter of departmental examination or any other agreement between the examiner and the public authority that the work of examination done by the examiner shall be kept secret and confidential and will not be open to scrutiny by any other person including the examiners. In almost similar situation, where an examinee sought inspection of his answer sheet in an university examination, replying to the plea of fiduciary relationship seeking exemption from disclosure of information by taking recourse to provision contained in Section 8(1)(e) of the Act of 2005, Division Bench of the High Court of Calcutta in the case of University of Calcutta (supra), held as under:

“The plea of fiduciary relationship, advanced by the CBSE has not impressed us. Fiduciary relationship is not to be equated with privacy and confidentiality. It is one where a party stands in a relationship of trust to another party and is generally obliged to protect the interest of the other party. While entrusting an examiner with the work of assessment/evaluation of an answer script there is no agreement between the examiner and the public authority that the work performed by the examiner shall be kept close to the chest of the public authority and shall be immune from scrutiny/inspection by anyone. At least nothing in this respect has been placed before us. Since the RTI Act has been enacted to promote transparency and accountability in the working of every public authority and for containing corruption, even if there be such a clause in the agreement between the examiner and the public authority the same would be contrary to public policy and thus void. We have no hesitation to hold that even if there be any agreement between the public authority and the examiner that the assessment/evaluation made by the latter would be withheld on the ground that it is confidential and an assurance is given in this respect, the same cannot be used as a shield to counter a request from an examinee to have access to his assessed/evaluated answer scripts and the RTI Act would obviously override such assurance. Having regard to our understanding of the meaning of the word 'fiduciary', there is little scope to hold that the etchings/markings made on answer scripts by an examiner are held in trust by the public authority immune from disclosure under the RTI Act. We find no force in the contention which, accordingly, stands overruled.”

“12. In the case of Dr. Mrs. Anson Sebastian (supra), where a Scientist working with the Institution applied to the Information Officer for getting information pertaining to certain documents relating to domestic enquiry against an employee and also for getting entries in the confidential reports of many other employees, repelling the argument that the Institution is not obliged to disclose information on account of it holding information in fiduciary capacity, it was held that Section 8(1)(e) of the Act of 2005 has no application as it deals with information available with the person in his fiduciary relationship with another and the provision applies to the relationship that exists between a patient and a doctor, a lawyer and a client etc. It was held that the provision contained in Section 8(1)(e) of the Act will have no application in relation to information sought by an employee about other co-employees of the same employer.

13. In the present case, the argument advanced that disclosure of information is exempted in view of the provision contained in Section 8(1)(e) of the Act of 2005, therefore, appears to be clearly misconceived in law and is liable to be rejected.”

HC-P&H Vikas Sharma 2014:

“8. A perusal of the order dated 26.04.2014 would show that the order passed by this Court was very clear and specific. It did not violate any law and rather fulfills the mandate and is in consonance with the provisions as contained under the 2005 Act. The objections which have been raised by the HPSC through the affidavit filed by the Secretary of HPSC dated 13.05.2014 placing reliance upon Section 8(1)(e) and (j) of the 2005 Act, cannot sustain in the light of the Division Bench judgment of this Court in State Bank of India v. Central Information Commissioner and another, 2009 (1) R.S.J 770 where it has been categorically held that information relating to the marks obtained by each of the candidate cannot be said to be personal information which would cause any unwarranted invasion into the privacy of an individual and such information do not find mentioned therein which would be exempted from the disclosure under Section 8 of the 2005 Act.

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“9. In view of the above, in order to bring transparency and dispel doubts, if any, in the minds of the candidates who have participated in the selection, it would be proper to direct uploading of the information about the results relating to all public posts by all concerned public authorities. This would reduce litigation under the Right to Information Act, 2005 which results in wastage of time, energy and money, both of the candidates and the public authorities. This will enhance the credibility of the authorities making selection which would be in public interest. As recorded above, the HSSC and the HSTSB have already complied with the order dated 26.04.2014 passed by this Court, in view of the reasons mentioned above, a direction is issued to the HPSC to comply with the order dated 26.04.2014 in toto within a period of two weeks from today. This would apply to the selections which have been held by the HPSC results of which have been declared from March, 2014 onwards. The HPSC, HSSC and HSTSB shall also ensure compliance with the provisions as contained under Section 4 of the 2005 Act which mandates the public authority to maintain records in the computerized form after the display of the result on the website. The process as indicated in the order dated 26.04.2014 in the form of submissions of Mr. Ashwani Baksbi, Advocate, be followed and complied with. The result alongwith the information as has been ordered to be displayed on the website vide order dated 26.04.2014 shall be available on the website for a period of three weeks with facility of downloading it. It is made clear that these directions shall not be specific to the selection in question in the present writ petition but would be a perpetual mandamus for the HPSC, HSSC and HSTSB for all selections to be made by these authorities in future as well.”

HC-DEL UoI vs. Col. VK Shad 2012:

“19.2... there are two kinds of relationships. One, where a fiducial relationship exists, which is applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, executors and beneficiaries of a testamentary succession; while the other springs from a confidential relationship which is pivoted on confidence. In other words confidence is reposed and exercised. Thus, the term fiduciary applies, it appears, to a person who enjoys peculiar confidence qua other persons. The relationship mandates fair dealing and good faith, not necessarily borne out of a legal obligation. It also permeates to transactions, which are informal in nature...”

19.3 In the instant case, what is sought to be argued in sum and substance that, it is a fiducial relation of the latter kind, where the persons generating the note or opinion expects the fiduciary, i.e., the institution, which is the Army, to hold their trust and confidence and not disclose the information to the respondents herein, i.e., Messers V.K. Shad and Ors. If this argument were to be accepted, then the persons, who generate the notes in the file or the opinions, would have to be, in one sense, the beneficiaries of the said information. In an institutional set up, it can hardly be argued that notes on file qua a personnel or an employee of an institution, such as the Army, whether vis-a-vis his performance or his conduct, in any manner, can benefit the person, who generates the note or renders an opinion. As a matter of fact, the person who generates the note or renders an opinion is presumed to be a person who is objective and not conflicted by virtue of his interest in the matter, on which, he is called upon to deliberate. If that position holds, then it can neither be argued nor can it be conceived that notes on file or opinions rendered in an institutional setup by one officer qua the working or conduct of another officer brings forth a fiduciary relationship. It is also not a relationship of the kind where both parties required the other to act in a fiduciary capacity by treating the other as a beneficiary. The examples of such situations are found say in a partnership firm where, each partner acts in fiduciary capacity qua the other partner(s).

19.4 If at all, a fiduciary relationship springs up in such like situation, it would be when a third party seeks information qua the performance or conduct of an employee. The institution, in such a case, which holds the information, would then have to determine as to whether such information ought to be revealed keeping in mind the competing public interest. If public interest so demands, information, even in such a situation, would have to be disclosed, though after taking into account the rights of the individual concerned to whom the information pertains. A denial of access to such information to the information seekers, i.e., the respondents herein, (Messers V.K. Shad & Co.) especially in the circumstances that the said information is used admittedly in coming to the conclusion that the delinquent officers were guilty, and in determining the punishment to be accorded to them, would involve a serious breach of principles of natural justice, as non-communication would entail civil consequences and would

render such a decision vulnerable to challenge under Article 14 of the Constitution of India provided information is sought and was not given. [See *UOI vs. R.S. Khan* MANU/DE/2841/2010 : 173 (2010) DLT 680]. (Emphasis added)

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“22. I may only add a note of caution here: which is, that protection afforded to a client vis-a-vis his legal adviser under the provisions of Section 126 to 129 of the Evidence Act, 1872 is not to be confused with the present situation. The protection under the said provisions is accorded to a client with respect to his communication with his legal advisor made in confidence in the course of and for the purpose of his employment unless the client consents to its disclosure or, it is a communication made in furtherance of any illegal purpose. The institution i.e. The Indian Army in the present case cannot by any stretch of imagination be categorized as a client. The legal professional privilege extends only to a barrister, pleader, attorney or Vakil. The persons who have generated opinions and/or the notings on the file in the present case do not fall in any of these categories”.

HC-HP State Bank of India 2014:

“29. In *Union of India v. R.S. Khan*, MANU/DE/2841/2010 : AIR 2011 Delhi 50, the Court held as under:

“10. The next submission to be dealt with is that information contained in the files in the form of file notings made by the different officials dealing with the files during the course of disciplinary proceedings against the Petitioner were available to the Union of India in a 'fiduciary relationship' within the meaning of Section 8(1)(e) of the RTI Act. This Court concurs with the view expressed by the CIC that in the context of a government servant performing official functions and making notes on a file about the performance or conduct of another officer, such noting cannot be said to be given to the government pursuant to a 'fiduciary relationship' with the government within the meaning of Section 8(1)(e) of the RTI Act, 2005. Section 8(1)(e) is, at best, a ground to deny information to a third party on the ground that the information sought concerns a government servant, which information is available with the government pursuant to a fiduciary relationship, that such person, has with the government, as an employee.

11. To illustrate, it will be no ground for the Union of India to deny to an employee, against whom the disciplinary proceedings are held, to withhold the information available in the government files about such employee on the ground that such information has been given to it by some other government official who made the noting in a fiduciary relationship. This can be a ground only to deny disclosure to a third party who may be seeking information about the Petitioner in relation to the disciplinary proceedings held against her. The Union of India, can possibly argue that in view of the fiduciary relationship between the Petitioner and the Union of India it is not obligatory for the Union of India to disclose the information about her to a third party. This again is not a blanket immunity against disclosure. In terms of Section 8(1)(e) RTI Act, the Union of India will have to demonstrate that there is no larger public interest which warrants disclosure of such information. The need for the official facing disciplinary inquiry to have to be provided with all the material against such official has been explained in the judgment of the Division Bench of this Court in *union of India v. L.K. Puri*, MANU/DE/0957/2008 : 2008 151 DLT 669, as under:

“”The principle of law, on the conjoint reading of the two judgments, as aforesaid, would be that in case there is such material, whether in the form of comments/findings/advise of UPSC/CVC or other material on which the disciplinary authority acts upon, it is necessary to supply the same to the charge sheeted officer before relying thereupon any imposing the punishment, major or minor, inasmuch as cardinal principle of law is that one cannot act (sic: act) on material which is neither supplied nor shown to the delinquent official. Otherwise, such advice of UPSC can be furnished to the Government servant along with the copy of the penalty order as well as per Rule 32 of the CCS (CCA) Rules.””

f) Extract from judicial order discussed in chapter 20

HC- DEL UPSC 2011:

“5. We are unable to accept the said contention. The information submitted by an applicant seeking a public post, and which information comprises the basis of his selection to the said public post, cannot be said to be in private domain or confidential. We are unable to appreciate the plea of any secrecy there around. An applicant for a public post participates in a competitive process where his eligibility/suitability for the public post is weighed/compared vis-à-vis other applicants. The appointing/recommending authorities as the UPSC, in the matter of such selection, are required and expected to act objectively and to select the best. Such selection process remains subject to judicial review. Though at one time it was held (See Dr. Durvadhan Sabu v. Jiteadra Kumar Mishra MANU/SC/0541/1998 : (1998) 7 SCC 273) that a writ of quo warranto questioning appointment to a public office/post cannot be filed in public interest but some exceptions have been carved out to the said principle also (See N. Kannadasan v. Ajay Khose MANU/SC/0926/2009 : (2009) 7 SCC 104).

6. Moreover the information seeker i.e. the respondent herein in the present case is not a stranger to the selection process but the father of another applicant. Certainly an applicant to a public post who has been overlooked is entitled to know the reasons which prevailed with the appointing/recommending authority for preferring another over him. Without such information, the applicant who has remained unsuccessful would not even be in a position to know as to why he/she was not appointed and another preferred over him/her and would also not be able to seek judicial review against the irregularity if any in the appointment/selection process. Moreover, we are unable to fathom the secrecy/confidentiality if any as to the educational qualification and experience of the selectee to a public post; such information ordinarily also is in public domain and educational qualifications and experience are something to be proud of rather than to hide in a closet. Whosoever on the basis of his educational qualification and experience seeks appointment particularly to a public office cannot claim any secrecy/confidentiality with respect thereto.

7. It is also not the plea of the appellant UPSC that the selectee had furnished the information as to his/her educational qualification and/or experience to the appellant UPSC with any rider as to its disclosure as in fact he could not. We also find Section 8(1)(e) and (j) under which exemption is claimed, themselves carve out an exception of the disclosure of the information being in public interest. We are of the view that disclosure of information as to the educational qualification and experience of a person selected/shortlisted for a public post is in public interest in as much as the selectee is seeking the benefit of appointment to the public post on the basis thereof and the competitors in the appointment process, if not the public are definitely entitled to know the qualifications and experience of the occupant of such public post. The Apex Court in *The Institute of Chartered Accountants of India v. Shaunak H. Satya* MANU/SC/1006/2011 : (2011) 8 SCC 781 held that the object of the RTI Act is inter alia to ensure transparency and bring in accountability. It was further held that examining bodies should change their old mindset and tune themselves to the new regime of disclosure of maximum information.”

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“ 11. LPA 802/2011 is preferred against the order dated 19th April, 2011 of the learned Single Judge dismissing W.P. (C) No. 2442/2011 preferred by the appellant UPSC impugning the order dated 12th January, 2011 of the CIC directing the appellant UPSC to provide to the respondent/ information seeker photocopies of the experience certificates of the candidates who applied for the post of Senior Scientific Officer (Biology) in Forensic Science Laboratory of the Government of National Capital Territory of Delhi and who were interviewed on 10th & 11th September, 2009.

12. In this case also the defence of the appellant UPSC was of Section 8(1)(j) of the Act. The CIC held that since length of experience was an eligibility condition for being invited for the interview, the experience certificate furnished by the candidates could not be treated as personal information and directed the appellant UPSC to provide photocopies of the experience certificates of the candidates who had been invited for the interview. The respondent/information seeker in the present case was himself one of the applicants and had not been invited for the interview. The learned Single Judge has while dismissing the

writ petition held that photocopies of experience certificates cannot be held to be invasion of privacy or requiring the confidentiality under Section 8(1)(f) of the Act and further held that disclosure of such information could also be said to be in larger public interest.

13. The challenge by the appellant UPSC in this appeal is the same as in LPA 797/2011 (*supra*) and need is as such not felt to reiterate what has already been observed hereinabove. Those who are knocked out before the interview even and did not have a chance to compete any further, are definitely entitled to know that they have not been knocked out arbitrarily to deprive them from even competing any further.” (Emphasis added)

g) Extracts from judicial orders discussed in chapter 24

SC Namit Sharma 2012:

“98. The Chief Information Commissioner and members of the Commission are required to ... be well versed with the procedure that they are to adopt while performing the adjudicatory and quasi judicial functions ... The legislative scheme of the Act of 2005 clearly postulates passing of a reasoned order in light of the above. A reasoned order would help the parties to question the correctness of the order effectively and within the legal requirements of the writ jurisdiction of the Supreme Court and the High Courts.”

“99....This discussion safely leads us to conclude that the functions of the Chief Information Commissioner and Information Commissioners may be better performed by a legally qualified and trained mind possessing the requisite experience. The same should also be applied to the designation of the first appellate authority, i.e., the senior officers to be designated at the Centre and State levels. However, in view of language of Section 5, it may not be necessary to apply this principle to the designation of Public Information Officer.”

“106...6. We are of the considered view that it is an unquestionable proposition of law that the Commission is a judicial tribunal performing functions of judicial as well as quasi-judicial nature and having the trappings of a Court. It is an important cog and is part of the court attached system of administration of justice, unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to the machinery of administration.

7. It will be just, fair and proper that the first appellate authority (i.e. the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law.

8. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a judicial member, while the other an expert member. The judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A law officer or a lawyer may also be Son the date of the advertisement. Such lawyer should also have experience in social work. We are of the considered view that the competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India.

9. The appointment of the judicial members to any of these posts shall be made in consultation with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.”

SC UoI vs Namit Sharma 2013:

“23. While performing these administrative functions, however, the Information Commissions are required to act in a fair and just manner following the procedure laid down in Sections 18, 19 and 20 of the Act. But this does not mean that the Information Commissioners are like Judges or Justices who must have judicial experience, training and acumen.

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24. Once the Court is clear that Information Commissions do not exercise judicial powers and actually discharge administrative functions, the Court cannot rely on the constitutional principles of separation of powers and independence of judiciary to direct that Information Commissions must be manned by persons with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court.”

“25... any direction by this Court for appointment of persons with judicial experience, training and acumen and Judges as Information Commissioners and Chief Information Commissioner would amount to encroachment in the field of legislation. To quote from the judgment of the seven-Judge Bench in *P. Ramachandra Rao v. State of Karnataka* (supra):

““Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.””

“26... this Court has "read into" Sections 12(5) and 15(5) of the Act missing words and held that such persons must have a basic degree in the respective field as otherwise Sections 12(5) and 15(5) of the Act are bound to offend the doctrine of equality. This "reading into" the provisions of Sections 12(5) and 15(5) of the Act, words which Parliament has not intended is contrary to the principles of statutory interpretation recognised by this Court.

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“32. ... As the judgment under review suffers from mistake of law, we allow the Review Petitions, recall the directions and declarations in the judgment under review and dispose of Writ Petition (C) No. 210 of 2012 with the following declarations and directions:

(i) We declare that Sections 12(5) and 15(5) of the Act are not ultra vires the Constitution.

(ii) We declare that Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner.

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(v) We further direct that the Committees Under Sections 12(3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.

(vi) We also direct that wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.”

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